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Supreme Court, U.S.
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In The Supreme Court of the United States

RONALD G. WILKINS,
Petitioner,

V.

UNITED STATES OF AMERICA, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the courts below ignore their duty to prevent the Navy's establishment of religion by failing to address the constitutionality of Petitioner Ronald Wilkins' selective early retirement ("SER") chaplain board when:

> A. four of the five board members were chaplains personally approved by the Chief of Chaplains (the Chief) or his Deputy who served as the board president?
> B. Wilkins board was composed under a 26 year policy or practice that *always* reserved one or more of the board membership for chaplains of the Roman Catholic faith; and
> C. the board's voting system allowed one board members' secret vote to destroy Wilkins' career or that of any other chaplains for any reason, legitimate or not, with no accountability and no constitutional safeguards against religious bias;

II. Did the courts below breach their duty to protect against the establishment of religion by ignoring the Navy's fusion of civic and religious power when the Navy consistently delegated discretionary civic power to denominational representatives to award or terminate the government benefits for other denominational representatives, and made such delegation with no accountability?

III. Did the Ninth Circuit transgress or ignore Fed.

R. Civ. P 56(f)'s requirement and this Court's precedent by allowing the District Court to cut off discovery of information it previously held was material critical to Petitioner's claims and then granted summary judgment before discovery was completed based on Petitioner's lack of evidence?

PARTIES TO THE PROCEEDINGS

The Petitioner, Plaintiff-Appellant in the Court of Appeals, is Commander Ronald Wilkins, CHC, USN, a board-retired Navy chaplain.

The Respondents, Defendants-Appellants in the Court of Appeals, are the United States under whose direction and control the United States Navy operates, the Secretary of the Navy, the Chief of Naval Personnel, and the Chief of Chaplains, all in their official capacities.

CORPORATE DISCLOSURE STATEMENT

No party is Corporation.

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No.

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On Petition for a Writ of Certiorari to the
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CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit en banc is unreported, and is set forth in the Appendix beginning at A-1. The opinion and judgment of the panel for the United States Court of Appeals for the Ninth Circuit is unreported, and is set forth in the Appendix beginning at A-2. The opinion and judgment of the District Court for the Southern District of California granting Respondents' motion for summary judgment and denying Petitioner's Rule 56(f) motion and cross-motion for summary judgment is set forth in the Appendix beginning at A-4.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered judgment for which review is sought on May 18, 2007 and denied Petitioner's Petition for rehearing en banc on August 2, 2007. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1343 and 1346.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Congress shall make no law respecting an establishment of religion ...." U.S. Const. Amend. 1.

"...[N]or shall any person be...deprived of life, liberty, or property, without due process of law...." U.S. Const. Amend. 14.

STATEMENT OF THE CASE

Understanding Petitioner Ronald Wilkins' unique status as a defender of religious liberties in the Navy Chaplain Corps (the "CHC") is necessary in order to place this case in context. Wilkins, a non-liturgical[1] Navy Chaplain, was the only chaplain to challenge Roman Catholic domination and control of CHC promotion boards. From October 1976 (FY77), the Navy gave Catholics two board memberships on

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[1] See Glossary.

every promotion board (the 2RC Policy) until February 1986. Wilkins, ordered to be separated on 12/31/85 for failure of selection (FOS) to lieutenant commander, challenged his FOS under the 2RC policy in federal court. Judge Thompson found Wilkins would probably win on his claim that the 2RC Policy violated the Establishment Clause and enjoined his discharge. *Wilkins v. Lehman ("Wilkins-I")*, No. 85-3031, slip op. 8-9 (S.D. Cal. 2/10/86). To settle *Wilkins-I*, the Navy agreed to promote him and end its 2RC policy, and Wilkins accepted. The Navy replaced one of the Catholics with a line officer on each board, but kept one Catholic on each board (the "1RC Policy"). The 2RC and 1RC Policies were instituted by Roman Catholic Chiefs of Chaplains.

Wilkins again caused the CHC trouble at Guantanamo Bay in 1992 when he resisted efforts to "suppress" (the word used by the base commander) his evangelical service because too many people attended it. Unrefuted evidence showed the CHC leadership considered Wilkins a "trouble maker" because he defended free exercise at Guantanamo and ended the 2RC Policy. For his "sin", the CHC removed him from Guantanamo one year early. After his request for an investigation was denied, the fiscal year (FY) 1995 selective early retirement ("SER") board (SERB) selected him for SER. Wilkins' SERB president was RADM Holderby, the detailer who removed him from Guantanamo. The Navy used Admirals as board members for all chaplain SER boards prior to Wilkins' SERB. His SERB was the first whose members were primarily chaplains (4 of 5

members) and composed under the 1RC policy, which the Navy defended throughout this litigation. Wilkins was the only chaplain with a combat valor award considered, had no FOS, had not yet been considered for Captain and had many years of service left, yet his SERB retained many chaplains who had multiple FOS to Captain and Commander, some with less than two years before mandatory retirement for age, thereby selecting Wilkins out.

In 1999, Wilkins filed a pro se constitutional attack on his SER, composed under the1RC Policy, and other CHC prejudicial policies. The District Court dismissed, holding his claims were barred by the Doctrine of *Feres v. United States*, and the Navy's Board of Correction for Naval Records (BCNR) should resolve Wilkins' constitutional challenges. After obtaining counsel, *Wilkins v. United States* ("*Wilkins II*"), 279 F.3d 782, 789 (9th Cir. 2002) reversed and found "the essence of Wilkins' case is a broad constitutional challenge to the structure and policies of the [Navy] chaplaincy" which were not appropriate to the administrative BCNR and remanded them to the District Court for adjudication.

After remand, Wilkins moved for partial summary judgment ("PSJ"). He argued that granting, denying or terminating government benefits, *i.e.*, promotions and careers, was an exercise of the sovereign's power and that delegating to professional denominational representatives, *i.e.*, chaplains, this life and death power over other

chaplains' careers without sufficient constitutional safeguards violated the Establishment Clause, *see Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 696-98 (1994), and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982). The District Court found that "[g]overnment practices 'granting a denominational preference' are suspect and courts should apply strict scrutiny in adjudicating their constitutionality," 10/3/02 Order Denying PSJ at 6, but material facts were in dispute including "whether the law and Navy policies under attack suggest a denominational preference," "whether the law and policy at issue lead to an excessive entanglement of government with religion, ... selections were made based on denomination, ... [and] to what extent chaplains on selection boards have acted with religious, rather than purely secular, motives." *Id.* at 7-8. "The dispute before the court concerns whether an unconstitutional SER board selected plaintiff for early retirement", and could the sovereign "constitutionally grant chaplains its authority to fire or promote other chaplains." 12/16/02 Order Denying Reconsideration at 5.

Wilkins then successfully moved to compel the Navy to release board personnel from their oath of secrecy. The District Court found that (1) no statute barred disclosure of board proceedings in litigation; (2) board personnel testimony and "the proceedings of the 1995 SER board [were] ' highly relevant' to Wilkins' constitutional claims because board members testimony was the only direct evidence available to Wilkins that might establish whether he

was "improperly selected for early retirement" and "*only* selection-board personnel ... have direct knowledge of possible religious discrimination" that occurred during his SER board,(emphasis added), 11/13/03 Order at 9-10; but (3) limited discovery to his SER board personnel. *Id.* at 114. *In re USA v. U.S. Dist. Court for So. Dist. of Cal.*, 384 F.3d 1202 (9th Cir. 2004), denied the Navy's subsequent appeal and mandamus petition.

When Wilkins asked the Navy when the Secretary would release SERB personnel from their oath and filed a motion to take additional discovery from other selection board personnel, the Navy filed for summary judgment, alleging that Wilkins had no standing and had failed to exhaust his administrative remedies. Wilkins opposed, arguing that: (1) discovery had not been completed and was necessary since the District Court had ruled that only board personnel testimony could determine whether he was preselected for SER or the board acted on religious bias; (2) he had standing; (3) statistics showed the 1RC policy benefited Catholics and prejudiced non-liturgical chaplains; (4) statistical and anecdotal evidence showed denominational representatives used the sovereign's power to benefit their own kind; (5) *Wilkins II,* rejected the Navy's exhaustion arguments since Wilkins' constitutional challenge to the composition of his SER board and other claims were legal issues beyond the competence of the BCNR, *see Wilkins II*, 279 F.3d at 789-90 (BCNR not equipped to address legal issues); (6) pursuing administrative remedies would be futile

because the BCNR had turned down the application of CDR Byrum, a chaplain selected by the FY96 SERB who raised identical issues.

Wilkins filed a Fed.R.Civ.P. 56(f) motion and declaration to delay summary judgment until after discovery was complete outlining Respondents' obstruction of discovery, the importance, existence and location of outstanding and necessary discovery, its relevance to Wilkins' claims, and outstanding discovery disputes. Ninth Circuit precedent holds "the Supreme Court has restated the rule as *requiring*, rather than merely permitting, discovery "where the non-moving party has not had the opportunity to discover information that is essential to its opposition." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis added) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

Wilkins cross-moved for partial summary judgment ("XPSJ") challenging the unconstitutional composition of his SERB under the 1RC Policy, the fusion of government and religious power on the board, and the board process which allowed one board member to control the board outcome by voting zero. He argued the 1RC Policy: (1) was a religious preference forbidden by the Establishment Clause, rendering his board a nullity; (2) statistical analysis of boards from FY80-02 showed (a) the 1RC policy benefited Catholics; (b) liturgical Protestants who were also favored in board memberships also benefitted; and (c) the board member's denomination

did affect board outcomes; and (3) the Navy's small chaplain promotion boards whose secret vote allowed a single denominational representative to manipulate the board results without accountability or constitutional guarantees violated the Establishment Clause, since a single zero results in non-selection or separation.

Wilkins' uncontested evidence showed: (1) there was at least one Catholic on every promotion board from FY1977 to 2003, and in some years as many as three, and (2) no other denomination was granted this right. The Navy argued that a Catholic on every board was necessary to ensure that the board fairly reflected the community's composition, which Wilkins showed was a sham. Chaplain board misconduct investigations showed that a single chaplain board member's "zero" vote would guarantee that a chaplain would not be selected for promotion and chaplains were selected for promotion based on denominational considerations.

Wilkins' statistical expert concluded that in every personnel area it was possible to measure with data, Catholics were preferred and non-liturgical chaplains such as Wilkins were prejudiced. Dr. Leuba provided numerous examples, *e.g.*, Catholics were three to eight times as likely to be promoted to Captain as non-liturgicals, and concluded that the board members' denominations influenced who was selected for promotion. Wilkins argued this satisfied the District Court's requirement for the application of strict scrutiny to CHC selection boards because the

promotion and SER processes were identical.

Wilkins also argued that the Navy's application of its faith group cluster (FGC) scheme to selection boards was prejudicial. It made Catholics (a single denomination) a single category, while numerous Baptists were categorized with many non-liturgical denominations, many of which had opposing theologies and divergent worship practices. This contrasted with the liturgical Protestant FGC whose denominations have a common history and worship system. The scheme guaranteed Catholics a seat on every board but not Baptists, who were as numerous as Catholics. This allowed Catholics to protect Catholic interests.

The Decisions Below

The District Court recognized that it must apply strict scrutiny to Wilkins' claim of denominational preference, A-19, but then found that he failed to meet his burden to show the Navy intended to discriminate, A-20; separated the SER process from promotions and found that he had presented no evidence of "systematic" discrimination on his SER board; Wilkins' retaliation claim was an "employee-employer" dispute so he had to exhaust his administrative remedies; and granted the Navy's motion for summary judgment. It rejected Wilkins' cross motion and denied Wilkins' Rule 56(f) motion and motion for additional discovery. It did not address why a Catholic was necessary on every board, including Wilkins', or reconcile how the Court

could deny Wilkins discovery into his SER board with its holding that only SER board personnel could provide evidence of religious prejudice or Wilkins' preselection.

The Ninth Circuit affirmed the District Court's holding focusing on the systematic discrimination claim and ignoring Wilkins' unconstitutional composition, retaliation and individual prejudice claims. It failed to apply strict scrutiny or any Establishment Clause test to any claim, its duty when confronted with such claims.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for three reasons. First, this is a case involving clear questions of constitutional law, addressing matters of national concern that ultimately affect the provision of free exercise of religion for sailors and marines, the application of the Establishment Clause to the Armed Forces and the appropriate standard of review of clear denominational preferences. A review of this case shows Wilkins was effectively denied his right to petition for redress of clear constitutional violations. While Wilkins is one chaplain, this case and its issues have implications far beyond him. Sixty-five non-liturgical Navy chaplains and two chaplain endorsing agencies are involved in three other district court cases raising similar issues. The litigation issues are major causes for the consistent

Navy chaplain recruiting shortfall since 2000. Allowed to stand, these ruling create a military exception to this Court's precedent. This case allows the Court to clarify its *plurality* opinion in *Board of Ed. of Kiryas Joel v. Grumet,* 512 U.S. 687 (1994), addressing the delegation of discretionary civic power to persons defined by their religious identity, which is the case here.

Second, as shown below, the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court", S.Ct. Rule 10(c), by refusing to conduct any Establishment Clause analysis or address Wilkins' Establishment Clause claims. In doing so, it neglected its duty under this Court's precedent to conduct a searching review of Establishment Clause claims to protect religious liberties from government encroachment.

Third, this Court has never allowed exceptions to the Establishment Clause's mandate of religious neutrality. Faced with an undisputed 26-year denominational preference, the Ninth Circuit ignored this rule and allowed the District Court to carve out a military exception to the Establishment Clause. The decision "has so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a).

The defining issue in this case is the failure of the Ninth Circuit to fulfill its duty to address and

reprove the fusion of government and civic power. Wilkins brought to the Ninth Circuit's attention three specific flagrant violations of the District Court's duty to address the Navy's illegal establishment of religion; the Ninth Circuit ignored them all, itself a dangerous precedent.

I. CERTIORARI IS APPROPRIATE BECAUSE THE COURTS BELOW REFUSED TO DO THEIR DUTY TO REVIEW THE NAVY'S 26-YEAR DENOMINATIONAL PREFERENCE, THEREBY INVITING ITS RETURN

This case from top to bottom raises Establishment Clause challenges to specific, long and well-established practices of the Navy Chaplin Corps resulting in a de facto established hierarchy of denominational or religious preferences. Petitioner specifically challenges the Navy's 26-year practice of reserving two and then one chaplain selection board memberships for representatives of the Roman Catholic Church. This practice drove the composition of every chaplain selection board that did not require all admirals as board members, whether for promotion or SER,[2] including his SER board. No other denomination was granted this privilege. On its face, this well-established practice is a per se denominational preference which gave one religious group effective control of every board composed under the practice, including Wilkins' SER board, as shown

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[2] For Captain SER boards, board members must be admirals.

below. Moreover, the Navy continued this denominational preference for 15 years after the *Wilkins I* court warned the Navy that its practice of reserving board memberships for Catholics would most likely be found unconstitutional on the merits. While the Navy modified that practice in 2002 in the face of this and other chaplain litigation, without a declaration that the practice was unconstitutional and an injunction, the Navy remains free to reintroduce the same practice at a later date, with the same or another denomination as its official denomination of preference.

This Court has treated the military as a special case when it comes to applying constitutional principles to its actions and practices. For example, *Goldman v. Weinberger*, 475 U.S. 503 (1986), is the only case addressing the application of the Free Exercise Clause to military regulations. *Goldman* held that the Free Exercise Clause did not prevent the Air Force from restricting a rabbi from wearing his yarmulke while in uniform because of the military's compelling need for uniformity in dress. The Court has been very deferential to military concerns, particularly when issues of discipline, *e.g.*, *Chapell v. Wallace*, 462 U.S. 296 (1983), or uniquely military areas such as training and weapons requirements, *Gilligan v. Morgan*, 413 U.S. 1 (1973). The District Court here granted the Navy almost blanket deference. A-18 n.6. While this Court has said "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes", *Chappell*, 462 U.S. at 300 [citation

omitted], it has never determined whether the Establishment Clause's prohibition against preferring one religion over another or fusing religion and civic power applies to the Armed Forces, *i.e.*, is there a military exception to the Establishment Clause. This case raises those questions.

A. Courts Have an Absolute Duty to Carefully Review Establishment Clause Challenges

This Court has made it clear that the judiciary has a solemn duty to examine the practice carefully and thoroughly when faced with an Establishment Clause challenge to a government practice. "What our cases require is careful examination of any [practice] challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that clause protects." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772 (1973). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 605, 608-9 (1989) (courts have a responsibility to protect against encroachment of the Establishment Clause). The courts below failed this test in a way that conveys the message that either the judiciary is indifferent to the Navy's encroachment of the Establishment Clause or the Navy is exempt from its provisions.

B. This Court Has Established a Procedure and the Appropriate Standard of Review for Examining Establishment Clause Claims.

This Court's precedent for addressing a denominational preference is very clear:

> Our decision in *Larson v. Valente*, 456 U.S. 228 (1982), supplies the analytic framework for evaluating petitioners' contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Hernandez v. C.I.R., 490 U.S. 680, 695 (1989) [footnote omitted]; *see also, County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (O'Connor, J. concurring) ("we have expressly required 'strict scrutiny' of practices *suggesting* 'a denominational preference,' *Larson*, 456 U.S. at 246, in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause.") (emphasis added).

"The clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. *See also Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (the state cannot "prefer one religion over another"). While this Court has said "this prohibition is absolute", *Larson*, 456 US at 246 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)), the courts below did not apply this absolute prohibition to the Navy. They studiously avoided doing so despite uncontroverted evidence of the Navy's 26-year denominational preference, a practice the Navy admitted and defended, and Wilkins' clear challenge to the fusion of discretionary civic power and religion on Navy selection boards.

C. The District Court Failed to Fulfill its Duty to Perform a Careful Examination of the Challenged Practices.

As shown in the statement of the case, Wilkins challenged the 26-year denominational preference, the driving policy behind the composition of his SER board. The Navy reserved chaplain selection board memberships for representatives of the Catholic Church for 26-years; from 1977 to 1986 it reserved two board memberships until Wilkins' 1986 litigation forced the Navy to reduce its reserved Catholic seat to one, until he again challenged the Navy's favoritism. Wilkins also raised an Establishment Clause challenge to the delegation of discretionary civic power to persons defined by their religious identity, *i.e.*, chaplains, citing *Kiryas Joel*, 512 U.S. at 698-99 ("That individuals who happen to be

religious may hold public office does not mean that a State may delegate discretionary power to an individual ... on the basis of religious identity."). He argued that (1) chaplains (a) were hired as denominational representatives who remained dependent upon their endorsing religious organizations for their continued careers in the Navy, and (b) the Navy treated them as denominational representatives by restricting their actions and duties to those related to Ministry, thereby defining them as inherently religious persons; (2) reserving a board membership for a Catholic was delegation of discretionary authority "on the basis of religious identity"; and (3) this resulted in a forbidden fusion of civic and religious power.

Wilkins also challenged the fusion of government and religion, *i.e*, the delegation of discretionary civic power over a chaplain's career to denominational representatives, in a system in which one secret vote without accountability destroys a chaplain's career. He argued 10 U.S.C. § 612, requiring a board have a minimum of five members, one of whom should be from the category under consideration, was unconstitutional as applied to chaplain selection boards. The Navy's unique chaplain selection system has a small number of chaplain board members who vote in secret without accountability, which allows a single secret "zero" vote to terminate a chaplains career for religious or any other type of bias. No other military service uses this system. Wilkins argued this delegation without guarantees that the power would be used for secular,

neutral and non-ideological purposes, *see Kiryas Joel*, 512 U.S. at 697, was a forbidden fusion of religious and governmental authority. The District Court correctly defined this problem in denying Petitioner's 2002 partial summary judgment but refused to address it in 2005 when Wilkins again presented the issue and evidence showing fusion. Wilkins also challenged the practices of (1) the Chief of Chaplains approving the chaplain board members before the CHC detailer submitted the tentative list to the Chief of Naval Personnel for approval, and the (2) the Chief or his Deputy serving as presidents of selection boards because of their influence and outright power.

Wilkins presented evidence from the Navy Inspector General's (NIG) own investigation that a chaplain board member's single zero vote ("zeroing out") did, in fact, torpedo the career of a chaplain candidate for Captain for "ideological" reasons. Other witnesses testified "zeroing out" was used frequently and with impunity. Wilkins also presented evidence from both the NIG and DOD Inspector General investigation of the FY97-98 chaplain commander promotion boards showing that denomination was the criteria for selection of some chaplains for commander, and, conversely, was the reason some chaplains were not selected. The Navy's Minority Affairs Officer's separate investigation of those boards, in response to a complaint of religious discrimination, (1) concluded that a denominational quota system appeared to be in effect; (2) documented the substandard, very poor records of some who were selected versus the stellar record of the complainant

who was not; and (3) presented summaries of the records of those selected, including the grades in specific rated areas (As-Ds), which exposed the CHC's claim that chaplain promotions were very competitive and only those with perfect records were selected. Wilkins' evidence showed chaplains consistently disregarded the Secretary's selection criteria and based their decisions on forbidden denominational considerations or biases.

Wilkins' statistician, Dr. Leuba, demonstrated that a chaplain candidate who was considered by a board containing a chaplain board member of the same or similar denomination had a statistically increased chance of being selected, *i.e.*, a board member's denomination influenced the outcome. Dr. Leuba also showed that Wilkins was selected out of turn, meaning that comparing the selections with the Secretary's criteria for retention using statistical methods, Wilkins should have been retained, having no FOS and many years of service left. Instead, the board retained chaplains with multiple FOS, including a Catholic with five FOS and imminent statutory retirement. A-46 (Bertrand). Because the Navy had not provided complete discovery or board member depositions due to the Navy's legal challenges, Wilkins moved to complete discovery and (at the hearing) to allow Dr. Leuba to continue his analysis.

Faced with this mountain of evidence, the District Court utterly failed its duty as described by this Court. There is no careful analysis, and no valid

strict scrutiny and/or *Lemon* test applied to any of the challenged practices. The District Court recognized that Wilkins raised a denominational preference issue and admitted that it had to apply strict scrutiny, but then not only failed to apply it properly, but placed the burden on Wilkins to show that the Navy intended to discriminate. A-20. This is a new test never before used in strict scrutiny analysis and seems to have been created to avoid addressing the 26-year denominational preference. Ignoring this Court's precedent in *Hernandez*, *Larson*, and *Lemon*, the District Court not only failed to apply strict scrutiny, *i.e.*, placing the burden on the government to show that the practice furthers a compelling purpose and is narrowly tailored to do so, it also failed to apply any Establishment Clause test to any challenged practice, including the 26-year preference.

The District Court erroneously isolated Wilkins' retirement board from the over 100 promotion boards (78 were in the career grades of LCDR to CAPT) identically composed by religious affiliation per the Navy's 1977-2002 policy. The District Court ignored the fact that the procedures of the boards were identical and that the reasons such isolation was inappropriate. First, 10 U.S.C. § 611 governs both types of active-duty selection boards and provides no discernible basis for isolating Wilkins' retirement board from the promotion boards composed by the same policy. Second, the Chaplain Corps Detailer Captain Rock (1994-1996), who nominated the membership of Wilkins' board,

testified that he was required to nominate a Roman Catholic chaplain for membership on *every* selection board. Third, the Navy said it used its (faith group cluster) membership appointment scheme on all selection boards. A-14. Fourth, the list of board members for every Commander SERB that had chaplains as board members (after FY94), including Wilkins, identifies a Catholic chaplain among the chaplain board members. Wilkins also presented other evidence showing that denomination was, in fact, a criterion for promotion on other boards, including a board that deselected a Protestant to make room for a Catholic after the Catholic board member objected because no Catholic had been selected.

The District Court's egregious method of addressing Wilkins' allegations of systemic religious discrimination isolated Wilkins' board from the promotion boards and the compelling evidence of discrimination and misconduct on them:

> However, because the factual predicate for the instant case involves only SER board proceedings, the Court analyzed Wilkins' claims of religious discrimination in SER board proceedings separately from his allegations of discrimination in promotion board proceedings. Only if Wilkins is able to demonstrate wrongful selection for early retirement does he have standing to raise a

> challenge to promotion board policies in the instant case.

A-14-15. This egregious methodology impermissibly transformed 26 years of board records documenting pervasive systemic religious discrimination into anecdotal evidence derived from relatively few retirement boards.

> In the absence of statistical evidence supporting Wilkins' claims of systemic religious discrimination, anecdotal evidence is insufficient to preclude defendants' motion for summary judgment. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) (noting that while a combination of statistical and anecdotal evidence may suffice to prove a policy of discrimination, anecdotal evidence alone is rarely sufficient).

A-44. This absurd methodology effectively skirted his challenge to the composition of his board by denying Wilkins standing to challenge the Navy's 26-year board policy which injured him and unlawfully constituted his board. More importantly, the absurd methodology enabled the Ninth Circuit to ignore the Navy's establishment of the Roman Catholic denomination and to produce the Circuit's appalling decision leaving it uncorrected.

The District Court then ignored Wilkins' other Establishment Clause challenges such as the fusion of religious and government power although it had accurately identified this as one of the critical elements of Wilkins' constitutional claims. Instead it relied on the presumption of regularity, applying it in an irrebuttable manner, relying on another district court's improper holding in a motion to dismiss.[3]

> Other courts have rejected arguments similar to that raised by Wilkins. Specifically, in *Adair v. England* (*Adair I*), when faced with the identical argument, the D.C. District Court stated:
>
> "Well-settled case law instructs courts to presume that government officials will conduct themselves properly. As this court has said, "government officials are presumed to act in good faith...[p]laintiff must present 'well-nigh irrefragable proof of bad faith or bias on the part of governmental officials in order to overcome this presumption".

A-27. This finding is willful blindness. It ignored

---

[3] A court must assume that the complaint's well-pleaded facts are true in ruling on a motion to dismiss. If the facts in the *Adair* complaint were true, chaplains were not operating under or following the law, and the presumption of regularity could not be valid.

Wilkins' mountain of evidence that showed chaplains acted like denominational representatives, rather than "government officials", while serving on promotion boards and awarding or denying benefits to other chaplains.

The District Court also denied Wilkins the opportunity to obtain the very evidence the District Court said was necessary to establish his claim. There is a circular logic to the District Court's decision. The District Court did not give Wilkins opportunity to develop evidence showing his SER board discriminated against him, granted summary judgment to the Navy and denied his Rule 56(f) motion and motion for additional discovery for the evidence the court previously said was necessary because the court had granted summary judgment. This is not justice.

D. The Ninth Circuit Failed to Fulfill its Duty to Perform a Careful Examination of the Challenged Practices.

Petitioner brought to the Ninth Circuit's attention three specific flagrant violations of the District Court's duty to address the Navy's illegal establishment of religion; the Ninth Circuit ignored them all. First, the District Court failed to apply strict scrutiny to the 26-year per se denominational preference. After stating it must apply strict scrutiny to that practice, the District Court redefined the term and criteria by holding that Wilkins failed to meet *his burden* showing the Navy *intended* to

prefer Catholics. The Ninth Circuit closed its eyes to the District Court's failure to apply binding precedent, strict scrutiny, and its unlawful creation of a new and erroneous precedent approving the establishment of religious preferences. The well-informed observer would conclude the Ninth Circuit's message is that either it is legal for the military to establish a hierarchy of religious preferences or that the Ninth Circuit favors Catholics.

Second, the District Court failed to address the fusion of government and religion by granting chaplains discretionary civic power without accountability or constitutional safeguards as required by *Kiryas Joel*. Third, the District Court failed to address the as-applied challenge to the chaplain selection board system in which denominational representatives are allowed to vote in secret and destroy other chaplains' careers without accountability. To both of these areas, the Ninth Circuit closed its eyes to the District Court's failure to apply binding precedent, creating in its stead a new and erroneous precedent approving the establishment of religion. The well-informed observer would conclude that the Ninth Circuit has no interest in preventing the fusion of religion and government.

Wilkins also brought to the Ninth Circuit's attention the fact that denial of discovery precluded him from obtaining the very evidence the District Court said was necessary to prevail and that the focus on "systematic discrimination" ignored the fact

that Wilkins claimed retaliation, as well as individual discrimination, which can only be established by the testimony of board personnel, which the District Court foreclosed after previously holding it was necessary and essential. The Ninth Circuit ignored this fact, essentially denying Wilkins his opportunity to seek redress.

II. THE COURTS BELOW FAILED IN THEIR DUTY TO RECOGNIZE THE RELIGIOUS NATURE OF CHAPLAINS, AND THAT NEUTRALITY FORBIDS THE FUSION OF RELIGIOUS AND CIVIC POWER

A. Chaplains Are Denominational Representatives Commissioned as Officers to Allow Soldiers to Exercise Their Religion

Because one fundamental issue here is the delegation of discretionary civic power to persons defined by their religious identity, an understanding of the definition and role of a military chaplain is important. Chaplains were in the Colonial Army and both the Continental Army and Navy. The U.S. Congress provided for Army and Navy chaplains almost since the foundling of the Republic. *Katcoff v. Marsh*. 755 F.2d 223, 225 (2d Cir 1985), provides a brief history of the Army chaplaincy. Congress authorized one chaplain for each of the six 44-gun ships it authorized in the Act of 1794, four years before it established the Department of Navy. Clifford Drury, The History of the U.S. Navy Chaplain Corps (NAVPERS 15807), p. 6. Chaplains

were appointed to the office of chaplain, an office historically defined as a religious leader, whereas other officers were appointed to a rank. Historically chaplains have been considered as unique officers whose office is defined solely in the context of religious duties. The statutes addressing them specifically identify their position with that of a religious leader, *e.g.*, 10 U.S.C. § 6031 authorizes chaplains to conduct public worship according to their church tradition. In keeping with their role as religious rather than military leaders, Navy chaplains were not given "'relative rank' by law until 1871 and real rank until 1899." Drury at 66. *See Rigdon v. Perry*, 962 F.Supp.150, 157 (D.D.C. 1997) ("military chaplains have 'rank without command.'").

Both DOD and the Navy recognize the religious nature of chaplains. DOD Instruction 1304.28 defines a chaplain as a "Religious Ministry Professional" or RMP: "An individual endorsed to represent a Religious Organization and to conduct its religious observances or ceremonies." ¶ E2.1.9. Endorsement is "The internal process Religious Organizations use when designating RMPs to represent their Religious Organizations to the Military Departments and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context." ¶ E2.1.7. The Navy recognizes the need to treat chaplains differently because of their religious character. SECNAVINST 1730.7b, ¶ 4.a restricts chaplains from the duties common to all other officers who use the sovereign's power such as sitting on courts martial, control of

funds, and duty officer. "Chaplains shall be detailed or permitted to perform only such duties as are related to religious ministry support." *Id.*

An Armed Forces Chaplain Board declaration submitted in *Rigdon* admitted that chaplains were faith group representatives on loan from their faith community. This is apparent because a chaplain must have an endorsement from a DOD-recognized Religious Organization. A chaplain who loses his endorsement can no longer serve as a chaplain unless he obtains a new endorsement; if he does not, 10 U.S.C. § 643 requires his separation unless he is reclassified to a non-chaplain category. Unlike all other officers, a chaplain's career depends upon the continuing endorsement from his religious organization, an agency outside the government.

The question both the District Court and the Ninth Circuit refused to address is what happens when this person, hired as a denominational representative, whose whole identity in terms of education, profession and practice is that of a religious leader, is given the life and death power over the careers of other denominational representatives, some who are of the same denomination and some who have very different beliefs and historic animosities. The statistical evidence from promotion boards, which was before both the District Court and the Ninth Circuit, shows that some of these denominational representatives act like the denominational representatives they were hired to be when awarding or denying benefits

and tend to select or reward those most like themselves. Five denominations represented 80% of the board memberships during the 26-year period, and those five denominations did statistically better than the other denominations that didn't appear as often as board members. Subsequent statistical evidence, prevented from being considered by the District Court's refusal to allow discovery to continue, shows that this same bias for those most like themselves permeates every area in which chaplains are asked to make decisions affecting benefits. This is the very fusion and preference which the Founders sought to prevent through the Establishment Clause. In the case of SER board results, as the later statistics demonstrates, having an advocate on the board increases one's chances of being retained. This is neither equal opportunity nor government neutrality in areas of religion. Under this Court's precedent, the Ninth Circuit should have addressed this issue.

B. Taking an Oath Does Not Change the Religious and Denominational Nature or Identity of a Chaplain

The Navy argued, and the District Court accepted, the idea that merely taking an oath was a sufficient constitutional guarantee to preclude chaplains from exercising religious favoritism when making decisions affecting other chaplains' careers such as promotions, retentions, or SER. This incredible assertion is contradicted by the evidence and is wrong as a matter of law. This Court has

never found that the presumption of regularity insulates a government official and shields his actions from judicial review under the Establishment Clause, whether a teacher, legislator or other official. If the District Court's holding is true, then this Court's holdings in all of its public school cases, *e.g.*, *Nyquist, Lemon, Kiryas Joel,* and other challenges are all wrong. Under the District Court's rationale, no public official can ever be accountable for violations of the Establishment Clause, or any other constitutional violation. The undisputed evidence is that denominational representatives act like denominational representatives when awarding or denying benefits. As this Court has said many times, although it "can assume" that churches, teachers or other officials "would act in good faith in the exercise of their statutory power [citation omitted] ... '[t]he potential for conflict inheres in the situation.'" *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982) (quoting *Levitt v. Committee for Public Education,* 413 U.S. 472, 480 (1973)).

C. Making Personnel Decisions That Distribute, Award or Deny Benefits Is an Exercise of the Sovereign's Power

Schlesinger v. Ballard, 419 U.S. 498 (1975) addressed a naval officer's allegation that a statutory scheme which treated male officers who had been twice FOS differently than female officers was unconstitutional. This Court explained the Navy's officer promotion system, its necessity to manage officers, and the military's "up or out" system, which

Congress had "developed to maintain effective leadership by heightening competition for the higher ranks while providing junior officers with incentive and an opportunity for promotion." *Id.* at 502-03. Thus, promotions and management of officer strengths at various grades are an integral part of running the Navy, an instrument of the sovereign's power and authority. It cannot be denied that decisions on who is promoted, or who, in the case of SER, is retained, are decisions of the sovereign. They are also decisions that award, continue or deny important government benefits because these decisions affect naval careers and officers' pay. Those benefit decisions are also an exercise of the sovereign's authority and power. This Court has held that religion cannot be the basis of awarding or denying government benefits. *Perry v. Sindermann*, 408 U.S. 593 (1972). The question before this Court is whether that restriction applies to the Navy.

III. THE NINTH CIRCUIT CREATED A MILITARY EXCEPTION TO THE ESTABLISHMENT CLAUSE BY IGNORING PRECEDENT AND ALLOWING THE DISTRICT COURT TO DO LIKEWISE

A. The Ninth Circuit Allowed the District Court to Avoid Applying Strict Scrutiny to an Obvious Denominational Preference

Unrefuted evidence shows that for 26-years,

every chaplain selection board that did not consist solely of admirals was constituted under a Navy policy that reserved two and then one board membership for the commissioned denominational representatives of the Roman Catholic Church. No other denomination was granted such a stranglehold on the CHC's selection process, a *per se* denominational preference. The evidence also shows that liturgical Protestants, who represent a minority of the faith preferences of DON personnel, were also given a preference in terms of board memberships, with at least one liturgical Protestant on all selection boards and sometimes as many as four. A-48. Wilkins' board was composed under this policy, a fact the Navy did not deny.

The record is also unrefuted that the lower courts did not follow this Court's precedent. "When a denominational preference is at issue, *Larson v. Valente*, 456 U.S. 228 (1982) supplies the analytic framework for the evaluation of [petitioner's] contentions. *Larson* teaches that when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions." *Hernandez*, 490 U.S. at 695. The Navy's reserving a board seat for Catholics is a denominational preference on its face. The District Court recognized that strict scrutiny was applicable, A-19, but failed to apply it. Instead of placing the burden on the Navy to show both a compelling purpose for the preference and a narrow tailoring, *see Larson*, 456 U.S. at 246, the District Court placed the burden on Wilkins to show there was an intent to

discriminate. A-20. This is not strict scrutiny. The Ninth Circuit knows what strict scrutiny is, but blessed this wholesale departure from this Court's accepted precedent. Intent is relevant only under the first part of the three part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Wilkins also argued the practice failed the "endorsement test", the message that a reasonable observer perceives from the challenged government action. Here, in the context of a selection system in which one zero vote can ruin a chaplain's career, the unmistakable message is that the Navy wants the Roman Catholic Church to exercise control over the promotion process. This is a forbidden message the Ninth Circuit has now embraced.

The Navy did not dispute that Wilkins' board was composed under its preferential 1RC policy, but tried to defend it as necessary to ensure adequate representation. This is an admission of a preference for Catholics, since it did not argue that Wilkins was entitled to a representative from his own denomination on the board in order to ensure adequate representation. Wilkins' expert has statistically shown in other chaplain litigation (using data produced later) that a chaplain candidate considered by any chaplain board (accession, promotion or SER) has an advantage if a board member is the same or a similar denomination. This is especially true in decisions to separate such as in Wilkins' case. This is not equal opportunity or religious neutrality. The Navy cannot have it both ways; if a Catholic is required for fair representation,

then religion must have some special significance and importance in the selection process, and everyone else must be offered the same fair representation under the Fifth Amendment. The Navy's argument makes religion relevant to a person's standing in a community, contrary to the express rulings of this Court. *See, County of Allegheny*, 492 U.S. at 594 (citation omitted). If religion did not matter in board composition or decisions, board assignments would be random.

The District Court's reliance on another District Court decision rendered in a motion to dismiss, *see* A-19, citing *Adair v. England*, 183 F.Supp.2d 31, 57 (D.D.C. 2002), is a prime example of why this Court's supervisory oversight is not only appropriate but required. Here, the District Court ignored this Court's specific instructions on how to address Establishment Clause challenges, *i.e.*, first examine whether there is a denominational preference and, if not, apply *Lemon*. *See Hernandez*, 490 U.S. at 695. The Ninth Circuit, faced with this obvious and fatal deviation by the lower court, neglected its duty to address the question with the diligence that this Court expects from the judiciary. "What our cases require is careful examination of any [practice] challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that clause protects." *Nyquist*, 413 U.S. at 772. *See also Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (courts have a duty "to make an independent examination of the whole record" in First Amendment cases); *County of Allegheny*, 492

U.S. at 605, 608-09 (courts have a responsibility to protect against encroachment of the Establishment Clause). In effect, the Ninth Circuit's refusal to address this glaring breach of the Establishment Clause has two effects. First, it validates a glaring military Establishment Clause exception providing authority for other courts to ignore governmental favoritism for specific religious traditions or beliefs, and second, it communicates to the well-informed observer that the court prefers Catholics since it refused to address the Navy's preference for and establishment of Catholic control over the chaplain selection system.

If Wilkins' board was illegally composed, which is clearly the case if this Court's Establishment Clause precedent is still valid, his SER board was a nullity, *see Dilly v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980). If another board is warranted, Wilkins is entitled to a board not composed on the basis of religion.

B. The Lower Courts Neglected Their Duty to Examine the Navy's Selection Process That Allows One Denominational Representative Board Member to Destroy a Chaplain's Career Without Accountability

To avoid addressing Wilkins' other challenges, the District Court accepted the Navy's statistics, never allowed Wilkins to pursue the very discovery the District Court said was necessary to prove his case of retaliation and/or individual discrimination,

and treated Wilkins' case as a class action rather than an historical event of individual discrimination or retaliation.

The underlying principle of the Fifth Amendment is that citizens should not be subject to arbitrary decisions by government officials. That principle intersects with the Establishment Clause in this case because it forbids religion or religious beliefs and practices from having relevance in deciding whether a chaplain should be retained or promoted. This Court has made it clear that religion has no basis in the award or denial of government benefits, and this should certainly apply to Navy promotion or retention decisions because they either grant or deny tangible government benefits. The Ninth Circuit refused to address these principles, although they were squarely before it.

The Navy is the *only* military service that places a chaplain's career in the hands of an individual board member without accountability by its secret voting process on boards with a small number of members. The Navy's own investigations, which were presented to the court, document the process of "zeroing out", a practice which a former Chief of Chaplains described and testified as to its effect. The Naval Inspector General verified it was well known and freely used and was the basis for a female board member to deny another female chaplain's promotion because of disagreement over a woman's role in ministry. The Navy's stealth assassination system stands in stark contrast to the

Army's and Air Force's officer promotion procedures described in various challenges. *See, e.g., Ward v. Chaldera*, 138 F.Supp.2d 1, 2 (D.D.C. 2001) (18-member LTC selection board); *Campa v. United States*, 50 Fed.Cl. 300, 301 (2000) (25-member board). *Sirmans v. Chaldera*, 138 F.Supp.2d 14, 18 (D.D.C. 2001), found that the Army's large board memberships prevented manipulation by one or a few members. Here, Wilkins challenged the fact that one board member could destroy his career and certainly did so, given that at least two board members had reason to do so, the Catholic board member who Wilkins alleged resented Wilkins' elimination of the 2RC policy, and RADM Holderby, who regarded Wilkins as a troublemaker and removed Wilkins from Guantanamo because he resisted attempts to suppress his evangelical service without providing another.

This issue is directly related, but separate from, the question below of whether the Navy can delegate discretionary civic authority in the award or denial of benefits to persons who are hired as denominational representatives. Here, the issue is whether there is accountability for government decisions that essentially end an officer's career. While the issue here is the use of religion or religious criteria, the underlying principle is protection from all forbidden criteria, *e.g.*, religion, race or gender. The NIG and DODIG investigations of Chaplain boards demonstrate the Navy's selection system provides the opportunity for personal vendettas. The courts below ignored their duty to examine and rule

on this issue, encouraging the further use of arbitrary actions under the cover of military deference.

C. Before this Court Is the Question Whether the Delegation of Discretionary Civic Power to Persons Defined by Their Religious Identity in the Award or Denial of Benefits to Denominational Representatives Violates the Establishment Clause

Kiryas Joel found that New York's creation of a special school district for Satmar Jews violated the Establishment Clause because it "delegates a power this court has said ranks at the very apex of the function of the state to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." 512 U.S. at 709-10 (citation omitted). The District Court held that the oath a chaplain took to follow the precepts (which forbid consideration of religion) was a sufficient guarantee to ensure the power to ruin or benefit the careers of other denominational representatives was not abused. A-26. This is a significant departure from this Court's requirement that any such delegation to persons identified by their religious character must have "'effective means of guaranteeing' a governmental power will be and has been neutrally employed." *Kiryas Joel*, 512 U.S. at 703 (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982) (must have guarantees to ensure that the power is used only for "secular, neutral and non-ideological purposes")).

The question in this case is not unlike that of *Kiryas Joel,* but the District Court and the Ninth Circuit failed their duty to address it. Before those courts was evidence this delegation of power to persons defined by the religious identity advanced religion in general and specific religions in particular. The Navy's own investigation showed how easy it was to torpedo a career over an ideological difference. It is now up to this Court to insist that lower courts follow the careful analysis and review, which this Court has said is necessary to ensure that the Establishment Clause is protected from both accidental and willing encroachment as in this case.

Rather than address the evidence from promotion boards that some denominational representatives do exactly what they were hired to do, further their own religious perspectives which reinforced Dr. Leuba's analysis of Wilkins' SER board, the District Court improperly separated promotion from SER board results. Promotion and SER boards differ in title only; they use the same procedures. The Secretary's SER precept established criteria for retention, *i.e.*, it told the board who it must retain, emphasizing future potential for further service. The board had to vote to retain; those not retained were separated. This allowed one member secretly voting "zero" to terminate a chaplain's career without accountability. Comparison of Wilkins' record against the Secretary's criteria and the records of those retained, A-46-47, shows his

selection was inconsistent with the Secretary's criteria but consistent with his claim of retaliation. Both the District Court and the Ninth Circuit avoided addressing the obvious fusion of government and religious power to persons defined by their religious identity in denying government benefits to Wilkins and other denominational representatives.

IV. A COMPELLING PUBLIC INTEREST WARRANTS THIS COURT'S REVIEW

Wilkins is not seeking redress for one or two errors, but for a series of judicial failures that have effectively deprived him of his ability to petition for redress of irreparable harm. First, the District Court dismissed Wilkins claims using as authority a doctrine this Court has limited to tort claims against the military. On remand, the District Court denied Wilkins' PSJ but defined the legal issues and the type of evidence he needed to prevail. However, when Wilkins showed that religion made a difference in promotions and that chaplains acted like denominational representatives instead of officers on promotion boards, the District Court said it didn't matter; when he asked for discovery, the District Court prevented Wilkins from showing he was indeed, a victim of prejudice and retaliation. The District Court then separated the SER process from promotions so it did not have to consider the prejudice in other parts of the Navy's selection system and process; said it had to apply strict scrutiny but never did by inventing a new burden shifting scheme and then ignored whether granting

denominational representatives the sovereign's power violated the Establishment Clause and other constitutional challenges. The Ninth Circuit said no foul and no harm.

This is an outright injustice causing continuing irreparable harm. The District Court's decision, affirmed by the Ninth Circuit, becomes a precedent for other chaplains' litigation, including a potential class action, currently attacking these same issues Wilkins challenges. It serves as a detriment for others who may later challenge the bias which will continue absent judicial intervention. Judicial economy would be served and irreparable harm prevented if this Court exercised its supervisory role by clarifying whether the Establishment Clause prohibition against denominational preferences applies to the Navy and by establishing the appropriate standard of review. *See Adair v. England*, 417 F.Supp.2d 1, 6 (D.C. 2006) (district court did not apply strict scrutiny to 26-year denominational preference because of presumption of regularity). The practices at issue here have led endorsers to recommend their clergy not consider the Navy as a viable career or ministry, resulting in a consistent chaplain recruiting shortfall, limiting the ability of sailors and marines to freely exercise their religion. Allowing these decisions to stand creates a military exception to the Establishment Clause, a breach that will widen over time.

CONCLUSION

Review by this Court is appropriate to establish the appropriate standard of review for a Navy denominational preference and fusion of civic and religious power.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

RONALD G. WILKINS,

Petitioner,

V.

UNITED STATES OF AMERICA, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD G. WILKINS, Plaintiff–Appellant, v. UNITED STATES OF AMERICA; et al., Defendants–Appellees.	No. 05-56109 D.C. No. CV-99-01579-IEG ORDER

Appeal from the United States District Court
For the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding

Argued and Submitted May 8, 2007
Pasadena, California

Before: KLEINFELD and PAEZ, Circuit Judges, and HART**, Senior Judge.

The full court has been advised of the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

FILED
AUG 02 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

** The Honorable William Hart, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD G. WILKINS, Plaintiff–Appellant, v. UNITED STATES OF AMERICA; et al., Defendants–Appellees.	No. 05-56109 D.C. No. CV-99-01579-IEG MEMORANDUM[2]

Appeal from the United States District Court
For the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding

Before: KLEINFELD and PAEZ, Circuit Judges, and HART**, Senior Judge.

The district court properly granted summary judgment to the United States on Wilkins's claims of systemic discrimination in the Navy's early retirement selection process. Statistical evidence that was unrebutted in the district court demonstrated that no systemic discrimination was operating in the

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[2] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable William Hart, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

early retirement selection process. With regard to Wilkins's remaining claims involving his selection for early retirement, the district court properly found them within the competence of the Navy's administrative appeals process; therefore administrative exhaustion is required.[1]

Wilkins has no standing to pursue his claims that involve generalized critiques of the Navy's management of the Chaplain Corps, including promotion, because he is no longer in the Navy, and thus there is no case or controversy between him and the United States.[2] Discriminations in promotions, were it shown, might, in the absence of other evidence, lend support to the inference Wilkins urged. However, neither Wilkins's showing nor the rest of the evidence in the record establish a genuine issue of fact regarding selection for early retirement.

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[1] See Wilkins v. United States, 279 F.3d 782, 789 (9th Cir. 2002).

[2] See Warth v. Seldin, 422 U.S. 490, 498 (1975).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

	) CASE NO. 99-CV-1579-IEG(LSP)
	)
	) ORDER: (1) GRANTING
	) MOTION FOR
RONALD G. WILKINS,	) SUMMARY
Plaintiff,	) JUDGMENT;
	) (2) DENYING
	) PLAINTIFF'S MOTION
v.	) FOR PARTIAL
	) SUMMARY
	) JUDGMENT;
THE UNITED STATES	) (3) DENYING
OF AMERICA, et al.,	) PLAINTIFF'S MOTION
Defendants.	) FOR ADDITIONAL
	) DISCOVERY; (4)
	) DENYING PLAINTIFF'S
	) RULE (56)(F) MOTION;
	) AND DENYING
	) DEFENDANTS'
	) MOTION TO STRIKE

Presently before the Court are five separate motions filed by the parties in this case. On January 31, 2005, defendants U.S. Department of the Navy, Gordon England, Secretary of the Navy, Vice Admiral Ryan, Chief of Naval Personnel, and Rear Admiral Black, Chief of Chaplains (collectively "defendants") filed a motion for summary judgment as to plaintiff Ronald Wilkins' ("Wilkins") First

Amended Complaint ("FAC"). In response, Wilkins filed a cross-motion for partial summary judgment on February 28, 2005. Wilkins has also filed two discovery motions. Finally, defendants have filed a motion to strike the addendal declaration of expert Harold Leuba, Ph.D.

For the reasons discussed below, the Court grants defendants' motion for summary judgment in its entirety, denies Wilkins' cross-motion for partial summary judgment, denies Wilkins' discovery motions, and denies defendant's motion to strike the expert report.

BACKGROUND

In the early 1990's, Congress mandated that the Navy undergo a significant reduction in its active duty forces. (Defs' Mem. ISO Mot. For Summary Judgment at Exh. 3 (Decl. Of Veronica Berto ¶ 3).) In response to the congressional mandate, the Navy was required to employ selective early retirement ("SER") boards, which recommended officers for early retirement. (Id.) The Navy Chaplain Corps participated in the SER board procedure for fiscal years 1991-1998. (Id.) Wilkins served as a Navy Chaplain from 1974 until 1994, when he was selected for early (involuntary) retirement by the fiscal year 1995 SER board. (FAC ¶¶ 4-7.) As a result of the SER board's decision, Wilkins left the service on August 1, 1995 and has not been on active duty since that time. (Id.)

At the outset, it is important to isolate the allegations currently before the Court. The instant

case arises from Wilkins' claim that he was unconstitutionally selected for early retirement from the Navy Chaplain Corps due to the Navy's discriminatory policies toward non-liturgical faith groups in the Chaplain Corps. (Id. at ¶ 2.) Although Wilkins brought another lawsuit in 1985 alleging religious discrimination in chaplain promotion policies, (id. At ¶ 5), that case was voluntarily dismissed, and the court never fully addressed the merits of Wilkins' claims. Accordingly, the factual basis giving rise to the instant allegations is Wilkins' selection for early retirement, *not* his failure to be promoted.

A. The Underlying Complaint

The procedural history of this case is quite lengthy. On July 29, 1999, Wilkins filed a complaint alleging that various institutionalized practices of the Navy's Chaplain Corps violated the Establishment and Free Exercise Clauses of the First Amendment as well as the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments. (See Compl. At ¶¶ 22, 27, 34, and 45.) In his original complaint, Wilkins requested the following relief against defendants: recision of his involuntary early retirement; retroactive reinstatement to active duty with all the benefits and privileges included therein; an amendment of his records in the Navy to portray his actual performance; compensatory and punitive damages exceeding $68 million; and attorney's fees and costs as deemed appropriate. (See id. At ¶¶ 11.a-11.h and ¶¶ 12-14.)

On December 4, 1999, the Court granted defendants' motion to dismiss, finding that it lacked subject matter jurisdiction due to: (1) the exclusive jurisdiction of the Court of Federal Claims; (2) the Feres doctrine; and (3) failure to exhaust remedies before the Board for Correction of Naval Records (BCNR). Wilkins appealed. The Ninth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the matter. See Wilkins v. United States, 279 F.3d 782 (9th Cir. 2002). In its opinion, the Ninth Circuit affirmed dismissal of the damages claims, reversed the dismissal of claims for injunctive and declaratory relief, and remanded the matter to this Court for further proceedings. Id. at 790.

On remand, Wilkins amended his complaint, and defendants subsequently submitted and amended answer. In his amended complaint, Wilkins continues to allege that he was improperly selected for early retirement on the basis of his religious beliefs. (See First Amended Complaint ("FAC") ¶¶ 24, 33, 35.) Furthermore, Wilkins alleges that the same religious prejudice that resulted in his retirement permeates the Chaplain Corps generally and manifests itself in the Accession, continuation, promotion and separation processes. (Id. at ¶¶ 63-68.)

Specifically, the FAC contains the following twelve causes of action: (1) the Navy's chaplain SER board procedures violate the First and Fifth Amendments and the Religious Freedom Restoration act (RFRA); (2) the Navy has established and maintained an unconstitutional religious quota system; (3) the Navy's chaplain promotion and SER

board systems are unconstitutional; (4) the Navy has violated Wilkins' Fifth Amendment rights; (5) the Navy has established a preferred religious tradition; (6) the Navy's policy of furthering only a liturgical "general Protestant" service and restricting other forms of non-liturgical religious services violates the First and Fifth Amendments; (7) the Navy has denied or significantly burdened Wilkins' right to freely exercise his religion in violation of the First Amendment; (8) the Navy's challenged action discriminates against Wilkins' religious free speech; (9) the use of chaplains to rate other chaplains, except in unavoidable circumstances, violates the First Amendment; (10) illegal retaliation; (11) violation of the Religious Freedom Restoration Act (RFRA); and (12) conspiracy to violate Wilkins' constitutional and civil rights pursuant to 42 U.S.C. § 1985.[1]

B. Discovery Dispute

During discovery, Wilkins sought to depose various individuals who had served on selection and promotion boards for the Chaplain Corps. However, members of these boards swear an oath of secrecy to not discuss their deliberations. (See SECNAVINST 14201.A ¶ 12(f).) Although Wilkins requested that defendants release the board members from this oath, his request was initially refused. Thereafter,

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[1]Wilkins admits that defendants' motion for summary judgment should be granted as to count twelve because the claim is barred by the doctrine of sovereign immunity. (Pl's Opp. To Defs' Mot. For Summary Judgment at 1:15-16.)

on November 13, 2004, the Court granted Wilkins' request for discovery relating to members of the 1995 SER board, but prohibited discovery relating to members of other selection boards.

On January 8, 2004, defendants appealed this Court's order to the Ninth Circuit and filed a petition for a writ of mandamus. Soon thereafter, the D.C. Circuit issued a decision on the precise issue of discovery of Navy selection board proceedings. In re England, 375 F.3d 1169 (D.C. Cir. 2004). The Ninth Circuit dismissed the appeal for a lack of jurisdiction, denied the application for a writ of mandamus, and instructed defendants to seek resolution of new issues brought to light by the England decision in this Court.

In response to the Ninth Circuit's opinion, defendants filed a motion for reconsideration of the Court's November 13, 2003 order. On December 23, 2004, the Court denied defendants' motion for reconsideration. The Court noted that while England barred disclosure of *promotion* board proceedings for discovery purposes, it did not specifically address the question of whether *SER* board proceedings were subject to discovery procedures.

Subsequent to the Court's December 23, 2004 order, Wilkins brought a motion seeking to take discovery of additional selection board personnel. In response, defendants filed the instant motion for summary judgment. Thereafter, in response to defendants' motion for summary judgment, Wilkins filed a cross-motion for partial summary judgment. Additionally, Wilkins filed a motion pursuant to Federal Rule of Civil Procedure 56(f). Finally

defendants filed a motion to strike as untimely the supplemental report of expert witness Harold Leuba, Ph.D.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. V. Catrett, 477 U.S. 317, 322 (1986); see also Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 2002) (recognizing that where material facts are undisputed, the court only decides the application of relevant law). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the non-moving party's case, or (2) by demonstrating that the non-moving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. See id. At 322-23.

Once the moving party meets the requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that thee is a genuine issue for trial." Anderson, 477 U.S. at 256. It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. Id. at 250. To make such a showing, the non-moving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 325. The requirement that a non-moving party go beyond the pleadings is meant to further one of Rule 56's principal purposes, namely "to isolate and dispose of factually unsupported claims or defenses." Id. at 323-24.

On cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof that will face at trial. When the moving party bears the burden of proof at trial, "his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Macalma v. Bank United of Texas, 192 B.R. 751, 753 (N.D. Cal. 1995) (citing William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)); In contrast, a moving party who will not bear the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby

shifting to the non-moving party the burden of raising genuine issues of fact by substantial evidence. Id. (citing T.W.Electric v. Pac. Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987); Kaiser Cement v. Fischbach and Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir. 1986)).

B. Analysis

As mentioned above, Wilkins alleges twelve causes of action in the FAC. These allegations may be grouped into two categories: (1) claims challenging Wilkins' selection for early retirement, and (2) claims challenging the management of the Navy Chaplain Corps.[2] In the first category, Wilkins challenges his selection for early retirement by alleging that he was the victim of systemic discrimination against all non-liturgical Protestant chaplains (counts one, two, five, seven, nine and eleven), that chaplain participation in selection boards is a violation of the First Amendment (counts one, three, and nine), that the Navy's past policy of identifying the religious affiliation of board candidates violated the Establishment Clause of the First Amendment (count 3), that the Equal Opportunity guidance given to members of his SER board violated the Fifth Amendment (counts one and four), and that his selection for early retirement was retaliation for

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[2] The twelve causes of action in the FAC are not organized according to specific constitutional or statutory violations, but rather contain overlapping allegations. As a result, the Court finds it more appropriate to analyze Wilkins' claims according to the type of alleged violations, rather than claim by claim.

previous lawsuits (counts one and ten). In the second category, Wilkins challenges the management of the Chaplain Corps, including demographics (counts two and seven), promotion policies (counts two, three, five and seven), the provision for Protestant worship services (count six) the chaplain rating procedures (count nine), and an established preference for liturgical Protestant and Roman Catholic chaplains (count five, seven and eight).

1. Wilkins' Challenge to his Selection for Early Retirement

Since 1986, the Navy has organized the Chaplain Corps according to four faith groups clusters: (1) Roman Catholic, (2) liturgical Protestant), (3) non-liturgical Protestant, and (4) Special Worship. (Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at Exh. 5 (Definition of Faith Group Clusters).) Describing the rationale for these four classifications, a former Chief of Chaplains explained:

> The four clusters were chosen because three of them (liturgical Protestant, non-liturgical Protestant and Roman Catholic) come together somewhat naturally when ecclesiastical theologies, worship practices and historical traditions are considered. The fourth cluster, currently composed of Jewish, Orthodox, Latter Day Saint [sic], Christian Science, Seventh Day Adventist [sic] and Unitarian faith

> groups have considerations best managed by not subsuming them under other clusters.

(Id. at Exh. 3 (Mem. By Rear Admiral John R. McNamara).)

In selecting officers for selection boards, the Navy sought equal representation among faith group clusters by attempting to place at least one Roman Catholic, one liturgical Protestant, and one non-liturgical Protestant on each board. (Pl's Mem. ISO Cross-Mot. For Partial Summary Judgment at Exh. 12 (Deposition of Stephen B. Rock at 50:9-12).) Because the Special Worship cluster contains far fewer chaplains than the other three clusters, chaplains from these faith groups were not always present on each SER board. (Pl's Mem. ISO Cross-Mot. For Partial Summary Judgment at 13:13-17.)

a) Wilkins' Allegations of Systemic Religious Discrimination

Throughout the FAC, Wilkins alleges that there is a widespread policy of religious discrimination against non-liturgical Protestant Chaplains. According to Wilkins, this bias against non-liturgicals is evident in both SER board proceedings and chaplain promotion policies. However, because the factual predicate for the instant case involves only SER board proceedings, the Court analyzes Wilkins' claims of religious discrimination in SER board proceedings separately from his allegations of discrimination in promotion board proceedings. Only if Wilkins if able to

demonstrate wrongful selection for early retirement does he have standing to raise a challenge to promotion board policies in the instant case. Lujan v. Defenders of Wildlife, 504 U.S. 556, 560 (1992) (finding no standing unless plaintiffs alleged an injury that could be properly remedied by the court).[3]

In challenging his selection for early retirement, Wilkins alleges that he was the victim of systemic discrimination against non-liturgical Protestant chaplains. Specifically, Wilkins alleges that although another chaplain more closely fit the criteria for early retirement, the 1995 SER board improperly selected him for early retirement due to a bias against non-liturgical Protestants. (Pl's Mem. ISO Cross-Mot. For Partial Summary Judgment at 17:1-11.) Additionally, Wilkins alleges that the Navy has a policy of discriminating against non-liturgical Protestants in its retention policies. (FAC ¶ 67.B)

Defendants argue that they are entitled to summary judgment as to Wilkins' claims of systemic discrimination because Wilkins had failed to demonstrate any evidence of such discrimination, either on his SER board, or on SER boards generally. In support of their argument, defendants first submit the official numbers and denominations of those chaplains who were reviewed by the SER 1995 board. (Defs' Mem. ISO Mot. For Summary Judgment at Exh. 4 (p. 213).) According to the results submitted by defendants, the selection rate of non-liturgical Protestant chaplains was actually lower than the

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[3] If Wilkins was selected for early retirement due to an unconstitutional policy of discrimination, he would be eligible for reinstatement and subject to a newly convened review board.

selection rate for both Roman Catholic and Liturgical Chaplains. (Id.)[4] Defendants also submit statistics from SER boards convened during fiscal years 1991-1998. (Id. at Exh. 24 (p.695).) A review of these boards shows that non-liturgical Protestant chaplains were selected for early retirement at substantially the same rate as chaplains from other denominations. (Id.) As a result, the Court finds that defendants have met their preliminary burden of showing the absence of a genuine factual dispute on Wilkins' claim of systemic discrimination.

In an effort to refute defendants' statistics, Wilkins raises three challenges to the denominational classifications used by the Navy. First, Wilkins argues that several of the denominations characterized as "non-liturgical Protestant" by the Navy, are in actuality, denominations which follow a set liturgy. Second, Wilkins challenges the constitutionality of the Navy's use of faith-group clusters. Third, Wilkins submits his own statistical data, which allegedly proves a policy of systemic discrimination against non-liturgical Protestants. The Court addresses each of Wilkins' arguments in turn.

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[4] According to the results submitted by defendants, there were a total of fifteen non-liturgical Protestant chaplains eligible for consideration by the 1995 SER board. (Def's Mem. ISO Mot. For Summary Judgment at Exh. 4 (p. 213).) Of those fifteen, only three were recommended for early retirement, yielding a selection rate of 20%. In contract, four out of nine liturgical Protestant chaplains were selected for early retirement, or 44.4%. (Id.) Additionally, one out of two Roman Catholic chaplains was selected for early retirement, or 50%. (Id.)

i. The Navy's Classification of Religious Denominations

In response to defendants' statistics regarding both the 1995 SER board and SER boards generally, Wilkins argues that several of the denominations classified by the Navy as "non-liturgical Protestant" are actually more properly placed in other faith-group clusters. However, even using Wilkins' preferred faith group classifications, the rate of selection for early retirement for non-liturgical Protestant chaplains by the 1995 SER board is still less than that of their Roman Catholic and liturgical Protestant counterparts. (Defs' Mem. ISO Mot. For Summary Judgment at Exh. 26(p. 702).)[5] Additionally, adopting Wilkins' denominational classification does not alter the conclusion that all chaplains considered by the 1995 SER board, regardless of faith group, were treated in substantially the same manner.

ii. The Navy's Use of Faith-Group Clusters

Wilkins also challenges the constitutionality of the Navy's faith-group cluster system. According to Wilkins, the four cluster system is biased in favor of Roman Catholics, because the Roman Catholic

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[5] Adjusting the faith group classifications to correspond with Wilkins' denom9ination preferences still shows that 20% of eligible non-liturgical Protestants were selected for early retirement, while 40% of eligible liturgical Protestants and 50% of Roman Catholics were selected for early retirement.

cluster is comprised of only one denomination, while the liturgical Protestant faith cluster represents thirty-one different denominations, and the non-liturgical Protestant faith cluster represents thirty-eight different denominations. (Pl's Mem. ISO Cross-Mot. for Summary Judgment at 13:6-12.) Thus, according to Wilkins, the chances that a board candidate from the non-liturgical Protestant cluster would have a representative from his or her own denomination as a board member were far less than the denominational representation guaranteed to Roman Catholics. (Id. at 13:9-12.)[6]

The Establishment Clause mandates that government policies be neutral and not favor one religious sect over another. Larson v. Valente, 456

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[6] Wilkins also argues that the Navy's use of faith group clusters violates the Navy's own regulations. Because the Chaplain Corps attempts to place at least one representative from each cluster on each board, Wilkins argues that the Navy has failed to comply with its own mandate that, "Chaplain Corps board members shall be nominated without regard to religious affiliation." (Pl's Mem. ISO Cross-Mot. at Exh. 1). The Court notes that the language to which Wilkins points is not actually included in the Supplemental Guidance pertaining to SER board, but rather only in sections pertaining to promotion boards. (See id.; Def's Mem. ISO Mot. For Summary Judgment at Exh. 23 (p.689).) Moreover, the Navy is entitled to deference in interpreting its own instructions and/or regulations. Goldman v. Weinberger, 475 U.S. 503, 506-07 (1986) (distinguishing the military from civilian entities and affording "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); Philips v. Perry, 106 F.3d 1420, 1429 (9th Cir. 1997) (citing Goldman, 475 U.S. at 507). Accordingly, the Court denies Wilkins' mot8onfor summary judgment as to this issue.

U.S. 228, 246 (1982) ("[t]he fullest realization of true religious liberty requires that government effect no favoritism among sects. . .and that it work deterrence of no religious belief.") (internal citation omitted). As a result, when a government policy involves a denominational preference, the Court must apply strict scrutiny in assessing the policy's constitutional validity. County of Allegheny v. American Civil Liberties Union, 492 U.S. at 608-09 ("We have expressly required strict scrutiny of practices suggesting a denominational preference.")(internal citations omitted); Larson, 456 U.S. at 246-47 ("In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). Based on the Supreme Court's rulings in Larson and County of Allegheny, Wilkins urges the Court to analyze the faith group cluster system according to strict scrutiny.

The Court agrees that when a plaintiff carries his initial burden of showing that the challenged policies "suggest denominational preference," see County of Allegheny, 492 U.S. at 608-09, the Court should assess the validity of the policy in question according to strict scrutiny. Adair v. England, 217 F.Supp.2d 7, 15 (D.D.C. 2002) (Adair II). However, in raising an Establishment Clause claim, the plaintiff must show that the government policy at issue was adopted *with the intention of discriminating*. Adair v. England, 183 F.Supp.2d 31, 57 (D.D.C. 2002 (Adair II) (noting "the importance of the government's intent in the Establishment Clause

calculus"). In Larson, where the Supreme Court overturned a section of the Minnesota Charitable Solicitations Act for violating the Establishment Clause, the Court repeatedly stressed that it had evidence showing that the "statute does not operate evenhandedly, nor was it designed to do so." 456 U.S. at 253. Additionally, in County of Allegheny, the Court analyzed whether a holiday display containing religious icons was erected with the *intent* of proselytizing in furtherance of any one faith. 492 U.S. at 607.

In this case, Wilkins has failed to show that the faith group cluster system was implemented with the intention of discriminating against non-liturgical Protestant Chaplains, or even that the system has a disparate impact on the number of non-liturgical Protestants selected for early retirement. See Adair I, 183 F.Supp.2d at 57 n.24. Indeed, while both the FAC and Wilkins' cross motion for partial summary judgment contain allegations that the faith group cluster system was "illegal" and gave "forbidden denominational preference" to Roman Catholics, none of the evidence presented to the Court establishes the Navy's *intentional* discrimination. (See Pl's Mem. ISO Cross-Mot. for Summary Judgment at 4:6-10; FAC ¶ 55.) Instead, it appears that Wilkins begins with the assumption that the faith group cluster system was adopted with an impermissible motive, rather than proving such improper motive actually existed. See County of Allegheny, 492 U.S. at 605.[7]

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[7] Wilkins also argues that Chaplain Corps policies, including the faith group cluster system, violate the Religious Freedom

In defending against a motion for summary judgment, it is insufficient for a plaintiff to rest on mere allegations or denials contained in his pleadings. Anderson, 477 U.S. at 256. Indeed, the requirement that the non-moving party go beyond the pleadings is meant to isolate and dispose of factually unsupported claims and narrow the claims in preparation for trial. Celotex, 477 U.S. at 325. Thus, without going beyond the claims raised in the FAC and providing an actual showing of intentional discrimination, Wilkins' constitutional challenge to the faith group cluster system must fail.[8]

Restoration Act (RFRA) by "substantially burden[ing] [his] Free Exercise rights and those of other non-liturgical Christian chaplains and Navy personnel without a substantial government purpose. . ." (FAC ¶ 94.) However, in this case, Wilkins has submitted no evidence suggesting that the Navy's cluster system was created with an impermissible religious purpose. Additionally, Wilkins has not shown that the faith group cluster system imposes a substantial burden upon his free exercise rights. Lastly, when reviewing *military* policies for possible infringement of individual free exercise rights, courts are far more deferential than when reviewing laws or regulations designed for civilian society. Goldman v. Weinberger, 475 U.S. 503, 507 (1986). The Supreme Court has instructed courts to "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Id. Accordingly, the Court grants defendants' motion for summary judgment as to Wilkins' RFRA claim.

[8] Wilkins brings a cross-motion for summary judgment on his claim that the faith group cluster system violates the Establishment Clause. A party moving for summary judgment on an issue on which he bears the burden of proof at trial must show that no reasonable trier of fact could possibly find other than for the moving party. Macalma, 192 B.R. at 753. Because

iii. Addendal Declaration of Harold Leuba, Ph.D.

Lastly, Wilkins has submitted his own statistical data, which allegedly proves a policy of systemic discrimination against non-liturgical Protestant chaplains. A report submitted by Dr. Harold Leuba on July 10, 2003 not only opines that defendants' percentages are skewed by improper categorization of chaplain denomination, but also finds that non-liturgical chaplains are often not considered for promotion due to systemic discrimination in the Chaplain Corps. (Defs' Mem. ISO Mot. for summary Judgment at Exh. 7 (p. 435).) By looking at the Navy's Alpha Roster of every member of the Chaplain Corps and his/her denomination over a period of time, Dr. Leuba found a large discrepancy between the promotion rates of liturgical and non-liturgical chaplains. (Id. (p. 436).)[9] Additionally, on February 28, 2005, Wilkins submitted an addendal declaration by Dr. Leuba to supplement his earlier analysis. In the addendal declaration, Dr. Leuba finds that Catholic Chaplains are nearly twice as likely to be promoted to Captain

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Wilkins has not presented any evidence of the Navy's intent to discriminate by adopting the faith group cluster system, the Court denies Wilkins' motion for summary judgment as to his constitutional challenge of the cluster system.

[9] Specifically, Dr. Leuba stated that a newly accessioned chaplain has a 30% chance of being promoted to Captain if he is a liturgical Protestant chaplain, but only a 17% chance of making it to Captain if he is a non-liturgical Protestant chaplain. (Defs' Mem. ISO Mot. for Summary Judgment at Exh. 7 (pp435-36).)

as liturgical Protestant chaplains and Baptists, and three to eight times as likely to be promoted to Captain as other non-liturgical Protestants and Special Worship chaplains. (Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at Exh. 15 (pp. 183-84).)[10]

While it is not the province of the Court to weigh the credibility of the evidence at the summary judgment stage, see Anderson, 477 U.S. at 255, it is proper for the Court to determine whether such evidence is relevant to the issues presented. Because both the original report as well as the addendal declaration only analyze *promotion* boards, the Court finds Dr. Leuba's conclusions to be irrelevant as to the question of systemic discrimination by *SER* boards. This Court has previously stated that promotion and SER boards are distinguishable in many ways. (December 23, 2004 Order at 5:16-6:18 (noting that promotion and SER boars are convened under different statutory subsections and serve different purposes).) For purposes of the instant

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[10] Defendants have moved to strike the addendal declaration of Dr. Leuba a untimely. In the alternative, defendants seek a continuance in order to properly respond to Dr. Leuba's most recent report. (Defs' Mem. ISO Mot. to Strike at 1:16-24.) In response, Wilkins argues that any untimeliness relating to Dr. Leuba's last report is directly attributable to defendants' failure to comply with discovery obligations. (Pl's Opp. to Def's Mot. to Strike at 4:10-5:25.) The Court denies defendants' motion to strike, but notes that Dr. Leuba's addendal declaration is not relevant to the issues presently before the Court, since his analysis pertains only to promotion board proceedings. As discussed in section B.2.a.), *infra*, Wilkins lacks standing to challenge Navy Chaplain Corps promotion policies.

motions, the most pertinent differences are that SER and promotion boards receive different governing instructions and make selections according to different criteria. (Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at Exh. 1; Defs' Mem. ISO Mot. for Summary Judgment at Exh. 23 (p.689).) Indeed, several of Wilkins' claims relate only to procedures followed by promotion boards, rather than SER boards. Given that promotion and SER boards are governed by different standards and serve different purposes, Wilkins must show how statistics relating only to promotion board policies are relevant to SER boards. Wilkins has failed to make any such showing.

Because Wilkins bears the burden of proof at trial, defendants need only point to the insufficiency of Wilkins' evidence in order to succeed on their motion for summary judgment. The defendants have shown that the statistics from both the 1995 SER board and other SER boards do not support Wilkins' claim of systemic religious discrimination. Wilkins has not submitted and statistical evidence to refute defendants' evidence. In fact, the only evidence submitted by Wilkins pertains to promotion boards rather than SER boards.

Based on the evidence submitted by defendants, the Court finds that defendants have met their preliminary burden of demonstrating that there is no genuine dispute regarding whether the 1995 SER board selected Wilkins for early retirement as a result of a policy of systemic discrimination toward non-liturgical Protestants. In fact, the statistics relating to the 1995 Board demonstrate that non-

liturgical Protestants were selected at a *lower* rate than their liturgical Protestant and Roman Catholic counterparts. Faced with no evidence to the contrary from Wilkins, the Court grants defendants' motion for summary judgment on this issue.

b) Wilkins' Challenge to Chaplain Participation in Chaplain Selection Boards

In addition to alleging systemic religious discrimination within the Navy Chaplain corps, Wilkins raises a facial challenge to chaplain participation on chaplain selection boards. Specifically, Wilkins argues that 10 U.S.C. § 612(a)(2)(A), which requires that at least one member of every selection board to be of the same category as the individual officer under review, is facially unconstitutional because it vests governmental authority in individuals defined by their religious denomination without any safeguards to ensure that they act in a faith-neutral manner. (See FAC ¶¶ 46-69.) As support for his claim, Wilkins cites the Supreme Court's decision of Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). (Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at 25:18-25.) In Larkin, the Court held that a Massachusetts law granting churches the discretion to veto liquor licenses violated the Establishment Clause because the statute did not contain any standards to ensure that the churches' power would be used in a religiously neutral way. Larkin, 459 U.S. at 125. Wilkins argues that the same danger exists with regard to current selection board procedures because

selection boards are comprised of only a few members, votes are secret, and one individual chaplain is capable of controlling an entire board's decision. (Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at 23:9-25:25.)

The Court finds Wilkins' claim unpersuasive for two main reasons. First, the instant case is distinguishable from Larkin. In Larkin, the Court stated, "We can assume that churches would act in good faith in their exercise of the statutory power." Larkin, 459 U.S. at 125. However, the Court found that because the statute did not require that churches' power be used in a religiously neutral way, the statute impermissibly granted governmental authority to religious institutions without the constitutionally-required safeguards. Id.. In this case, the statute contains safeguards to ensure that board members do not vote according to their individual ideological preferences, but rather according to the record of the applicant before them. Specifically, section 613 of the applicable statute requires that all board members "swear or affirm that he or she will perform his or her duties as a member of the board without prejudice or partiality." 10 U.S.C. § 613.

Second, Wilkins urges the Court to adopt the uncomfortable presumption that members of chaplain SER and promotion boards will abandon their duty as naval officers to protect the integrity of the selection board system and instead choose to base their decisions solely on denominational preferences. Although Wilkins does not claim that such denominational preferences will reign every single

time, he argues that the mere presence of the conflict between the naval officer oath and the denominational tie held by each chaplain is enough to violate the Establishment Clause. (Pl's MSJ at 25:12-17 (". . .this is a case where 'a conflict inheres in the situation.'" (quoting Larkin, 459 U.S. at 125)).)

Other courts have rejected arguments similar to that raised by Wilkins. Specifically, in Adair v. England (Adair I), when faced with the identical argument, the D.C. District Court stated:

> Well-settled case law instructs courts to presume that government officials will conduct themselves properly. As this court has said, "government officials are presumed to act in good faith...[p]laintiff must present 'well-nigh irrefragable proof of bad faith or bias on the part of governmental officials in order to overcome this presumption.

183 F.Supp.2d 31, 60. Additionally, in Ward v. Caldera, the D.C. District Court analyzed a plaintiff's discrimination claim founded on the allegation that minorities and women were likely to always vote in favor of promoting individuals who were in their respective groups. 138 F.Supp.2d 1, 8 (D.D.C. 2001). The Court found plaintiff's theory to be "devoid of logic." Id.

In this case, Wilkins has failed to present any evidence that Navy chaplains actually selected a non-liturgical protestant chaplain for early retirement solely on the basis of his/her denomination or faith

group affiliation. Absent evidence to the contrary, it would be illogical for the Court to presume that chaplains would vote according to denomination and in disregard of an individual's overall record. The Court therefore denies Wilkins' motion for summary judgment on this issue.

Defendants not only argue that Wilkins' motion for summary judgment should be denied as to his challenge regarding chaplains serving on selection boards, but also that they are entitled to summary judgment on this very issue. Defendants point to statistics indicating that the presence of chaplains on SER boards does not necessarily lead to favoritism based on a shared denomination of a board member and a board candidate. For example, SER boards convened between 1991-1994 did not include any Roman Catholic chaplains as members. (Pl's Mem. ISO Cross-Mot. for Summary Judgment at Exh. 24.) Yet, for boards held during that period, five of thirty-eight Roman Catholic chaplains were recommended for retirement, yielding selection rate of 13.2%. (Defs' Mem. ISO Mot. for Summary Judgment at Exh. 24.) In contrast, after 1994, the rate of recommendations of Roman Catholic chaplains for retirement was six out of twenty-nine, or 20.7%. (Id.) Thus, based on the statistics, it appears that the selection rate for Roman Catholics actually increased by 7.5% once Roman Catholic Chaplains were appointed to serve on SER boards. (Id.) Moreover, the selection rates for non-liturgical Protestant chaplains increased only marginally over the same period of time. (Id.) These statistics suggest that Wilkins' presumption of chaplains

favoring their own kind is unfounded, at least with regard to SER boards.

Wilkins has produced no statistics to respond to defendants' evidence. Instead, the analysis submitted by Dr. Leuba relates only to promotion boards. (See Pl's Mem. ISO Cross-Mot. for Partial Summary Judgment at Exh. 15.) Because (1) defendants have met their preliminary burden of showing the absence of a genuine factual dispute; and (2) Wilkins has failed to produce any rebuttal evidence demonstrating that factual issues remain unresolved, the Court grants defendants' motion for summary judgment as to Wilkins' challenge to the constitutionality of chaplains serving on SER boards.

c) Identifying the Religious Denomination of Chaplain Board Candidates

Wilkins also challenges the constitutionality of promotion and SER boards on the basis of the Navy's past policy of making the faith group affiliations of chaplains known to members of selection boards. (FAC ¶ 40.) According to Wilkins, until mid 2000, the Navy had a policy of displaying the three digit "faith group identifier" for each chaplain being considered for promotion or early retirement. (Id. at ¶ 49.) Wilkins further alleges that the procedure of displaying each chaplain's faith group affiliation was used with regard to the 1995 SER board that selected him for early retirement. (Id. at ¶ 41.) Wilkins argues that this procedure "had no other purpose than to create a suspect religious category unrelated to any legitimate Navy objective." (Id. at ¶ 42.) The

implication of Wilkins' allegations is that board members voted to either retain or retire chaplains on the basis of their religious affiliation.

This Court agrees that chaplains should be assessed based on their fitness as Naval officers rather then the religious message contained in their sermons. See Adair I, 183 F.Supp.2d at 62. However, there is no evidence that retention decisions made by the 1994 SER board, or SER boards generally, failed to adhere to this ideal. The statistics submitted by defendants demonstrate that Wilkins' claims of systemic discrimination are not supported by the evidence. Merely showing that candidates' faith group affiliations were identified, without also showing the presence of actual discriminatory treatment, is insufficient to state an equal protection claim. Adair II, 217 F.Supp.2d at 14 (holding that "by merely show...that the Navy displayed faith group identifiers to chaplain board members, plaintiffs [failed to meet] their initial burden to persuade the Court to apply strict scrutiny"). Indeed, when addressing this precise issue, the Adair II court found that the Navy's policy of "displaying AQD[11] codes *in and of itself* does not grant a preference to any religion." Id. (emphasis in original).

In this case, Wilkins alleges that the faith group identifiers of board candidates were displayed until mid 2000. (FAC ¶ 49.) However, statistics from SER boards convened from 1991-1998 show that non-

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[11] "AQD" is an abbreviation for "Additional Qualification Designator" and refers to the three-digit faith group identifier assigned to each chaplain.

liturgical Protestant chaplains were selected for early retirement at substantially the same rate as liturgical protestant chaplains and Roman Catholics. (See Defs' Mem. ISO Mot. for Summary Judgment at Exh. 4.) Although Wilkins is not required to prove denominational preference in order for the Court to analyze the policy under strict scrutiny, Wilkins has failed to carry even the lesser burden of showing that the Navy's policies "suggest" such a denominational preference. Adair II, 217 F.Supp.2d at 14-15 (articulating the burden of proof in Establishment Clause claims). Because (1) Wilkins has failed to articulate a basis for applying strict scrutiny, and (2) defendants have established that the past policy of displaying candidates' faith group affiliations did not result in actual discrimination, the Court grants defendants' motion for summary judgment on this issue.

d) Equal Opportunity Guidance to 1995 SER Board

Count four of the FAC alleges that the Navy's Equal Opportunity ("EO") guidance given to the 1995 SER board violated Wilkins' Fifth Amendment rights by treating female and minority chaplains in a preferential manner, thereby shielding them from selection for early retirement. (FAC ¶¶ 58-59.) The Fifth Amendment's Due Process Clause extends the Fourteenth Amendment's guarantee of equal protection to federal entities, such as the Navy. See Aderand Constructors, Inc. V. Pena, 515 U.S. 200, 204 (1955). Thus, in this case, Wilkins alleges that

the EO guidance resulted in discrimination by treating Wilkins differently than other similarly situated chaplains. (FAC ¶ 58.)

The 1999 SER board members received supplemental guidance to assist them in their task of selecting certain Navy chaplains for early retirement. (Defs' Mem. ISO Mot. for Summary Judgment at Exh. 23 (pp. 685-694).) With regard to female officers, EO guidance given to the 1995 SER board explained that the records of female officers may be different from their male counterparts "due to historic statutory restrictions on the assignment of women in the Navy." (Id. (p. 689).) As a result, board members were instructed to assess a female chaplain's "actual performance on assignments rather than her pattern of assignments as compared to male officers." (Id. (p. 690).) Additionally, with regard to minority officers, the EO guidance explained that "past discrimination may have operated to the disadvantage of minority officers. Such discrimination may have manifested itself in disproportionately lower fitness reports." (Id.) As a result, board members were instructed to consider that "equivalent performance by a minority officer and non-minority officer may not have resulted in equivalent fitness reports." (Id.)

Wilkins raises two distinct challenges to the supplemental guidance given to the 1995 SER board. First, Wilkins alleges that the EO guidance resulted in preferential treatment of minority and female chaplains. (FAC ¶ 59.) However, defendants point out that no women were considered for early retirement by the 1995 SER board. (Defs' Mem. ISO

Mot. for Summary Judgment at Exh. 3 (p. 203).) Additionally, only one minority chaplain was considered, and like Wilkins, he was selected for early retirement. (Id.) Because Wilkins cannot show that he was selected for early retirement instead of a female or minority chaplain defendants argue that they are entitled to summary judgment on this issue. The Court agrees.

In order to establish liability on an equal protection claim, Wilkins must not only point to a discriminatory policy, but also show that the policy substantially affected the Navy's decision to select him for early retirement. Christian v. United States, 337 F.3d 1338, 1343 (Fed. Cir. 2003) (citing Hary v. United States, 618 F.2d 704,b 707 (Ct. Cl. 1980)). In this case, even assuming that the EO guidance was improper, the evidence demonstrates that Wilkins was not selected for early retirement in place of a female or minority chaplains. Without proof that the challenged policy resulted in the wrongful discharge of Wilkins, the supplemental EO guidance, however improper, amount to harmless error. Id. (recognizing that harmless error analysis is appropriate even when the error is constitutional in nature). Indeed, the Supreme Court has held that "the government can avoid liability by proving that it would have made the same decision without the impermissible motive." Texas v. Lesage, 528 U.S. 18, 20-21 (1999). Accordingly, the Court grants defendants' motion for summary judgment as to Wilkins' equal protection claim with regard to female and minority chaplains.

Second, in his opposition to defendants' motion for summary judgment, Wilkins recharacterizes his

challenge to the EO guidance as a challenge to the preferential treatment of Roman Catholic chaplains. In support of his claim, Wilkins submits a declaration by Rear Admiral Holderby, suggesting that the Chaplain Corps tended to treat Roman Catholic priests as minorities. (Pl's Opp. to Defs' Mot. for Summary Judgment at Exh. 11.) However, it is clear that the supplemental EO guidance at issue in the FAC was intended to apply to *racial* minorities, rather than certain religious denominations. As a result, Wilkins' claim regarding the preferential treatment of Roman Catholic priests is more properly analyzed in conjunction with his claims of systemic discrimination of non-liturgical Protestants. As discussed above, Wilkins has failed to refute defendants' statistics showing no systemic discrimination by SER boards. (See Section B.1.a), *supra*.) Accordingly, the Court grants defendants' motion for summary judgment on this issue.

e) Retaliation Claim

Counts one and ten of the FAC allege that Wilkins was selected for early retirement in retaliation for previous challenges to Chaplain Corps policies. (FAC ¶ 90.) Specifically, Wilkins alleges that after successfully challenging the Navy's promotion policies in 1985, he gained a reputation as a troublemaker among chaplains of other faith groups. (Pl's Opp. to Defs' Mot. for Summary Judgment at 11:18-26; FAC ¶ 5(A).) According to Wilkins, members of the 1995 SER board acted upon this longstanding grudge in selecting him for early

retirement. As a result, Wilkins alleges that his selection for early retirement was in retaliation for his past protected activities, rather than a result of proper application of selection criteria. (FAC ¶ 90.)

Defendants argue that they are entitled to summary judgment on Wilkins' retaliation claim because Wilkins has failed to exhaust his administrative remedies.[12] Specifically, defendants seek to distinguish Wilkins' retaliation claim from the constitutional claims raised in the FAC. Defendants argue that, unlike his constitutional challenges to the policies and structure of the Chaplain corps, Wilkins' retaliation claim is not constitutional in nature, and thus more properly characterized as an employment dispute within the province of the Board of Corrections of Naval Records (BCNR), rather than a federal court.

In his retaliation claim, Wilkins does not challenge the validity of Chaplain Corps policies or SER selection criteria, but rather alleges that the members of the 1995 SER board failed to apply the established criteria in selecting him for early retirement. In such administrative matters, the BCNR has broad equitable powers to review whether the 1995 SER board properly applied the relevant selection criteria, or in the alternative, whether Wilkins is entitled to a new board. 10 U.S.C. § 1552(a)(1)(vesting authority in the BCNR to "correct an error or remove an injustice" from any military record). Although the Ninth Circuit has held that "[r]esolving a claim founded solely upon a

---

[12] Wilkins admits that he never submitted a claim to the Board of Corrections of Naval Records (BCNR).

constitutional right is singularly suited to a judicial forum..." Downes v. Warner, 481 F.2d 642, 643 (9th Cir. 1973), in this case, the Court finds that Wilkins' retaliation claim is distinguishable from other constitutional claims raised in the FAC. Unlike Wilkins' claims of First and Fifth Amendment violations, his retaliation claim merely alleges that the members of the 1995 board failed to follow the applicable criteria when making early retirement selections.

Generally, when alleging retaliation in the employment context, a plaintiff must exhaust his administrative remedies before seeking judicial relief. See Vasquez v. County of Los Angeles, 349 F.3d 634, 645 (9th Cir. 2003). The exhaustion requirement is meant to vest authority in an institution that is both knowledgeable and well-equipped to handle such specialized employment disputes. Indeed, in ruling on this very issue, the Ninth Circuit stated, "We agree that Wilkins must exhaust any claims that the [BCNR] has competence to address, but we hold that Wilkins' *constitutional* claims for declaratory and injunctive relief are not subject to the exhaustion requirement." Wilkins v. United States, 279 F.3d 782, 789 (9th Cir. 2002) (emphasis added). Because Congress specifically granted the BCNR authority to review board procedures and correct wrongful terminations, see 10 U.S.C. § 1552, the Court grants defendants motion for summary judgment as to Wilkins' retaliation claim for failure to exhaust his administrative remedies. See e.g., Christoffersen v. Washington State Air Nat'l Guard, 855 F.2d 1437, 1442 (9th Cir.

1988) (requiring military personnel to exhaust "available intra service remedies" before pursuing judicial review); Saad v. Dalton, 846 F.Supp. 889, 891 (S.D.Cal. 1994) (Finding that the BCNR has authority to order the reinstatement and back pay of individual service members when wrongful terminations occur). To allow Wilkins to obtain judicial review by circumventing the established administrative channels would be to open the door to a myriad of employment disputes which are more appropriately heard by a body with military expertise-the BCNR.

2. Wilkins' Challenges to the Management of the Chaplain Corps

a) Standing

In the FAC, Wilkins also challenges several aspects of the Navy Chaplain Corps unrelated to SER board proceedings. These claims focus on the demographics of the Navy Chaplain Corps, promotion policies, the provision for Protestant worship services, chaplain rating procedures, and a broad allegation that the Chaplain Corps has established a denominational preference for Roman Catholic and liturgical Protestant clergy.

Defendants argue that because Wilkins has failed to show that his selection for early retirement was the result of religious discrimination or denominational bias, he lacks standing to seek declaratory and injunctive relief with regard to the Navy's policies and activities. The Court agrees.

Federal courts are limited to issuing decisions that resolve an actual "case or controversy." See United States Constitution art. III § 2. Standing as one of the "essential elements of the "case or controversy" requirement, and prevents courts from issuing advisory opinions unconnected to live disputes. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order to establish standing, a plaintiff bears the burden of demonstrating (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. Northeastern Fl. Chapter of Assoc. Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 663-65 (1993). Importantly, a plaintiff seeking prospective relief, as Wilkins does in this case, must show more than a "past injury." See Sturm v. United States Dept. of the Navy, 2003 WL 22244944 at *1 (9th Cir. 2003). Rather, he must demonstrate that he is "realistically threatened by a repetition" of the alleged violation in the future. See City of Los Angeles v. Lyons, 461 U.S. 95, 109, 124 (1983).

On appeal from this Court's order of December 14, 1999, the Ninth Circuit dismissed Wilkins' claims for damages and significantly narrowed the scope of this case. As a result, only Wilkins' claims for declaratory and injunctive relief remain before this Court. With regard to his claims challenging the management of the Chaplain Corps, Wilkins urges the Court to: (1) bring the Navy Chaplain Corps into line with the Navy's religious demographics; (2) ensure that chaplain promotions are made in a non-

discriminatory manner; (3) provide approval and support for alternative non-liturgical Protestant services; and (4) correct officer files and records of non-liturgical Protestant chaplains who were subjected to religious discrimination. The Court finds that Wilkins lacks standing to seek these remedies because he has failed to show that his selection for early retirement was a result of religious discrimination. To establish standing, "a plaintiff must allege personal injury fairly traceable to the defendant[s'] allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). Because Wilkins' injury in this case (i.e. his involuntary retirement) has not been shown to be the result of any unconstitutional conduct by defendants, Wilkins is not entitled to reinstatement, and therefore cannot show that he will ever be subject to Navy Chaplain Corps policies in the future. Thus, even assuming that Wilkins' allegations are true, Wilkins' claims with regard to accession, promotion, demographic and management policies are not properly before this Court. The Supreme Court has stated, "Past exposure to illegal conduct does not in itself show a present case or controversy...if unaccompanied by any continuing, present adverse effects." Renne v. Geary, 501 U.S. 312, 320-21 (1991)(quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). Because Wilkins has not shown that he is realistically threatened by a repetition of the alleged violations in the future, the Court dismisses Wilkins' remaining claims for lack of standing.

3. Wilkins' Discovery Motions

As mentioned above, in its order of November 13, 2003, the Court granted Wilkins' request to depose members of the 1995 SER board that selected him for early retirement. Wilkins' discovery request was re-affirmed on December 23, 2004, when the Court denied defendants' motion for reconsideration. However, in both the November 2003 and the December 2004 orders, the Court explicitly limited the scope of Wilkins' discovery in order to protect the integrity of future Navy selection boards. (See November 13, 2003 Order at 13:4-14; December 23, 2004 Order at 8:17-20.)

On January 27, 2005, Wilkins brought a motion for discovery of additional selection board personnel. Additionally, on February 28, 2005, in opposition to defendants' renewed motion for summary judgment, Wilkins filed a motion pursuant to Federal Rule of Civil Procedure 56(f). The Court addresses each of these discovery motions in turn.

a) Wilkins' Motion to Take Discovery of Additional Board Personnel

In his recent motion requesting additional discovery, Wilkins seeks to depose members of five chaplain promotion boards, as well as members of the fiscal year 1996 chaplain SER board. As support for his request, Wilkins asserts that the alleged bias, denominational preference, and prejudice which resulted in his illegal selection for early retirement, is evident in these other board proceedings as well.

(Pl's Mem. ISO Mot. to Take Discovery of Additional Board Personnel at 1:19-22.) According to Wilkins, discovery of these additional board proceedings will produce evidence directly relevant to his claims of systemic discrimination against non-liturgical Protestant chaplains. (Id. at 17-18.)

In response to Wilkins' motion for additional discovery, defendants argue that in seeking depositions from members of six additional boards, Wilkins is essentially conducting a "fishing expedition" in search of evidence to support his allegations of religious discrimination. (Defs' Opp. to Pl's Mot. to Take Discovery of Additional Board Personnel at 9:19-27.) Defendants contend that statistics from the 1995 SER board, as well those from SER boards convened from 1991-1998, demonstrate that Wilkins' allegations of systemic religious discrimination are unfounded. (Id. at 9:4-14.) Moreover, defendants express concern that in giving Wilkins permission to depose selection board members *carte blanche*, the Court places the integrity of the peer review system in peril. (Id. at 18:3-19:19.) The Court shares defendants' concern, and has previously noted: "If Wilkins is able to depose any board member he wishes in a quest for evidence of discriminatory practices, communications within future boards would inevitably be chilled to some extent." (November 13, 2003 Order at 11:11-13.) Indeed, the Court's previous orders demonstrate the delicate balance between allowing discovery of facts necessary to prove Wilkins' case, and protecting the candid, uninhibited discussions that are essential to the selection board system.

On July 27, 2004, the D.C. Circuit held that 10 U.S.C. § 618(f), which was enacted as part of the Defense Officer Personnel Management Act (DOPMA), absolutely bars disclosure of Navy promotion board deliberations for purposes of civil discovery in judicial proceedings. In re England, 375 F.3d 1169 (D.C. Cir. 2004). In its order of December 23, 2004, this Court cited the England decision with approval, and for the first time, noted the statutory differences between promotion and SER boards. (December 23, 2004 Order at 5 n.1). Based on the England decision, the Court denies Wilkins' request for discovery pertaining to chaplain promotion boards.

With regard to Wilkins' request to depose members of the 1996 SER board, the Court relies on its previous orders limiting Wilkins' discovery to *his* SER board and no others. Moreover, in light of the instant order granting defendants' motion for summary judgment, Wilkins' request to depose members of even his SER board is now moot. While the Court's previous orders noted that discovery relating to the 1995 SER board would be relevant to proving that he was the victim of religious discrimination, the evidence submitted by defendants in support of their motion for summary judgment renders such depositions unnecessary. The FAC alleges that in being selected for early retirement, Wilkins was the victim of an overarching policy of religious discrimination that permeated the Chaplain Corps. (FAC ¶¶ 1, 24.A., 52.C., 67.) However, in examining SER board selection statistics, defendants have shown no significant disparity in the selection

rates of non-liturgical Protestant chaplains and chaplains from other faith groups. (Defs' Mem. ISO Mot. for Summary Judgment at Exh. 24.) In response, Wilkins has not presented any evidence to refute defendants' statistical analysis. As a result, Wilkins' motion for additional discovery is denied.

b) Wilkins' Rule 56(f) Motion

Lastly, Wilkins urges the Court to either deny defendants' motion for summary judgment, or in the alternative, order a continuance until he has had the opportunity to complete discovery pertaining to his SER board, as well as other relevant selection boards. (Pl's Mem. ISO Rule 56(f) Motion at 2.) Specifically, Wilkins argues that in order to defend against defendants' motion for summary judgment, he requires discovery relating to: (1) five promotion boards, none of which considered Wilkins for promotion; (2) the 1996 SER board, which was convened after Wilkins had already retired; and (3) the 1995 SER board, which selected Wilkins for early retirement. (Decl. of Arthur Schulcz, Sr. ¶ 5.)

Although Federal Rule of Civil Procedure 56(f) requires courts to defer judgment "where the non-moving party has not had the opportunity t9o discover information that is essential to its opposition," see Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001), the party seeking to conduct additional discovery bears the burden of setting forth specific, existing facts that, if discovered, would preclude summary judgment. See Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995). In

this case, Wilkins lacks standing to challenge chaplain promotion policies. As a result, discovery relating to promotion boards would not preclude summary judgment on that issue. Additionally, because Wilkins had already retired at the time the 1996 SER board was convened, those proceedings are not relevant to Wilkins' selection for early retirement by the 1995 SER board. Lastly, with regard to discovery of the Court finds that Wilkins has failed to show how the depositions of SER board members would preclude defendants' motion for summary judgment. While the Court's November 13, 2003 order stated that depositions of his SER board members would be relevant to Wilkins' claims of alleged discrimination, that order was entered prior to the submission of any significant discovery. Now, with the benefit of defendants' statistical evidence, the Court finds that Wilkins' claims of systemic discrimination are not supported by the evidence. In the absence of statistical evidence supporting Wilkins' claims of systemic religious discrimination, anecdotal evidence is insufficient to preclude defendants' motion for summary judgment. See Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991)(noting that while a combination of statistical and anecdotal evidence may suffice to prove a policy of discrimination, anecdotal evidence alone is rarely sufficient). Accordingly, the Court denies Wilkins' Rule 56(f) motion.

CONCLUSION

For the aforementioned reasons, the Court hereby **GRANTS** defendants' motion for summary judgment in its entirety and **DENIES** Wilkins' Rule 56(f) motion, as well as his motion to take discovery of additional board personnel. Finally, the Court **DENIES** defendants' motion to strike the addendal declaration of Dr. Harold Leuba.

IT IS SO ORDERED.

Dated: /June 29, 2005/

/s/

HON. IRMA A. GONAZLEZ,
Chief Judge
United States District Court
Southern District of California

cc: Magistrate Judge Leo S. Papas
All parties

Candidates Before the FY 1995 Chaplain Commanders' SER Board Ranked on Career Potential - Failures of Selection

Name	DOB	Endorser	FGC	CDR mo	CDR yr	SER	FOS	Career Potential Total Experience At CDR	Career Potential Years to Retire
De Long	1938	PUS A	L	10	86	X	8	9.83	5
Palmer, H D	1935	SB	B	1	85		7	10.08	2
Bunce	1937	SB	B	1	84	X	7	11.08	4
McCreary, S	1939	CHC CC	N	10	91		6	4.83	6
Bertrand	1934	RC	R	9	80		5	15.75	1
Clark, L S	1943	LMS	L	6	82	X	5	13.50	10
Kincl, R L	1942	RC	R	9	84	X	4	11.75	9
Jayne, B C	1943	SB	B	9	86	X	3	9.75	10
Pyrch (NMN)	1938	ORT H	L	4	87		3	8.33	5
Rowland, R G	1940	UM	L	9	87		3	8.75	7
Ware, N M	1943	UM	L	11	88	X	3	7.92	10
Erb	1943	CGA I	N	7	89		2	6.58	10
Klapach, F S	1947	AG	N	11	90		2	5.92	14
Simons*	1938	UM	L	5	93		0	2.42	4
Wilkins, R G	1941	IFC A	N	9	91	X	0	4.75	8
Umbaugh, R	1942	AG	N	8	91		0	4.67	9
Morris, D A	1944	UCC	L	1	91		0	4.08	11
Bennett, W T	1944	SB	B	4	91		0	4.33	11

Bankhead	1945	AME							
		Z	L	2	91	X	0	4.17	12
Newhouse, E	1945	SB	B	6	91		0	4.50	12
Durham, R W	1945	UM	L	9	91		0	4.75	12
Metzger D L	1945	CGC							
		T	N	9	91		0	4.75	12
Tumlin, G L	1946	SB	B	2	92		0	3.17	13
Stanfield	1946	UM	L	12	90		0	6.00	13
Harwood	1947	SB	B	6	91		0	4.50	14
Burt, R F	1948	OBS							
		C	N	3	93		0	2.25	15
Byrum	1949	PB	N	0	93		0	2.00	16

* Retirement eligible 4105, Reservist

FY77-02 Representation by Faith Group Versus Number of Boards

	Roman Catholic	Liturgical Protestant	Non-Liturgical Baptist	Non-Liturgical Other	Special Worship Jewish	Special Worship Other
No of Boards with **NO** Officers of this Faith:	0	0	16	49	66	57
No of Boards with **One** Officer of this Faith:	42	14	40	22	7	16
No of Boards with **Two** Officers of this Faith:	29	37	17	2	0	0
No of Boards with **Three** Officers of this Faith:	2	16	0	0	0	0
No of Boards with 4 Officers of this Faith	0	4	0	0	0	0

GLOSSARY AND DEFINITIONS

Glossary

The following abbreviations are used throughout this Petition:

Captain - CAPT
Commander - CDR
Lieutenant Commander - LCDR
Rear Admiral - RADM
Department of Defense - DOD
DOD Inspector General - DODIG
Naval Inspector General - NIG
Fiscal Year - FY

Definitions Related to this Petition

A. Failure to Select (FOS) - a military term of art meaning that the person was considered by a promotion board but not selected; also known as a "Pass over".

B. Faith Group. Not all religious churches or organizations believe in or consider themselves "denominations". To accommodate this belief and allow the many small non-denominational religious bodies or churches to have chaplains to minister to their military members, the DOD has historically allowed religious groups whose beliefs are similar to associate into "faith groups" for purposes of endorsing chaplains. DOD now uses the term "Religious Organization" to describe religious bodies

who "chose to participate in the Military chaplaincies" and endorse chaplains as the organization's representiaves to the Armed Forces. *See* DOD Instruction 1304.28 and Enclosure 2 ("Definitions"). The term "faith group" includes "denomination" and is used to signify both denominations and other distinct religious bodies and organizations.

C. Faith Group Categories. The Navy divides its chaplains and personnel into four general religious categories, allegedly according to faith group similarities: Catholic, Protestant liturgical, non-liturgical Protestant and Special Worship.[1] This categorization is explained in a Chief of Chaplains' 7/31/87 Memorandum for the Asst. Secy. of the Navy, Subj: Chaplain Corps Faith Group Imbalance in the context of how the Chaplain Corps uses faith group clusters to manage itself. The second and third terms are significant to this petition and its issues.

1. "Protestant liturgical" collectively describes those Christian denominations which trace their origins to the Protestant Reformation, *e.g.*, Lutheran and Reformed, "emphasize a sacramental theology including infant baptism, worship under officially adopted

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[1] The "Special Worship" category includes a group of faith groups, both Christian and non-Christian, whose ministry needs are distinctly different from the majority of Christian faith groups: Jewish, Christian Science, Seventh Day Adventist, Latter Day Saints (Mormons), Buddhist, Hindu, Moslem and Unitarian are in this category.

forms, wear vestments and follow a cycle of lectionary[2] readings." *Id.* at 2. "Protestant liturgical" means chaplains of the various Lutheran, Reformed, Episcopal, Methodist, Methodist Episcopal, Presbyterian, Congregational and Orthodox faith groups.

2. "Non-liturgical Christian" ("Non-liturgical") refers to those Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they emphasize preaching from the Bible, baptize only adults or children who have reached the age of reason, and their clergy "do not wear vestments and do not follow a cycle of lectionary readings" during services. *Id.* Some Navy chaplains refer to these faith groups as "evangelicals". Baptist, Evangelical, Pentecostal, Bible and Charismatic Churches, and Christian Churches and Disciples of Christ are examples of non-liturgical Christian faith groups.

3. "Liturgical tradition" refers to both Catholic and Protestant Liturgical faith groups.

D. Selection Board - a board convened under 10 U.S.C. § 612 (or other statutes) to select

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[2] A sequence or list of scripture readings to be read in church services at specific times throughout the year. Webster's New World Dictionary, p. 834 (1962).

officers for promotion or selective early retirement (SER).

E. Selective Early Retirement - the selection for involuntary retirement of officers who have reached the necessary time in service to qualify for military retirement; i.e., a forced retirement.

No. 07-600

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In The Supreme Court of the United States

RONALD G. WILKINS,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

In accordance with Supreme Court Rule 15.8, Petitioner Chaplain (Commander) Ronald Wilkins provides this supplemental brief to inform the Court of Respondents' recent citation to the District Court's and Ninth Circuit's decisions that Wilkins challenges here. Respondents' citation illustrates and supports Wilkins' reasons for granting certiorari.

Wilkins argues that the courts below failed in their duty to "carefully review Establishment Clause challenges," Petition at 14, 16-26, 31-35, and "the Ninth Circuit created a military exception to the Establishment Clause by allowing the District Court to "avoid applying strict scrutiny to an obvious denominational preference." *Id.* 31-35. Wilkins then argued this created a "compelling public interest warrant[ing] this Court's review", *id.* at 40, for several reasons. "The District Court's decision, affirmed by the Ninth Circuit, becomes a precedent for other chaplain's litigation, including a potential class action, currently attacking the same issues Wilkins challenges." *Id.* at 41. Wilkins also argued that "[j]udicial economy would be served and irreparable harm prevented if this Court exercised its supervisory role by clarifying whether the Establishment Clause prohibition against denominational preferences applies to the Navy and by establishing the appropriate standard of review." *Id.* (citing *Adair v. England*, 417 F.Supp.2d 1, 6

(D.D.C. 2006), which refused to apply strict scrutiny to the 26-year denominational preference because of the presumption of regularity).

Respondents cited the decisions challenged here in *Gibson v. U.S. Navy*, 06-cv-1696 (D.D.C.), a potential class action by non-liturgical chaplains challenging the constitutionality of many of the same policies Wilkins challenges here.

The Background for Gibson

The plaintiffs in *Gibson, et al., v. U.S. Navy* are 41 non-liturgical chaplains and a chaplain endorsing agency challenging many of the same policies Wilkins challenges, including the 26-year denominational preference granted to Catholics by reserving at least one selection board membership for Catholic chaplains.[1] It was filed in the Northern District of Florida in April 2006 but transferred to the District of Columbia under 28 U.S.C. § 1404(a) and consolidated with the two chaplain suits pending there, *Chaplaincy of Full Gospel Churches v. Winter* (formerly England) (*"CFGC"*), No. 99cv2945, and *Adair v. Winter* (formerly England), No. 00cv0566. The *Gibson* plaintiffs filed a petition in the D.C. Circuit for a writ of mandamus transferring the case back to the Northern District of Florida because the District of Columbia in not a district in which the

[1] Currently there are a total of 65 chaplain plaintiffs and two chaplain endorsing agencies in three lawsuits that have sought judicial review of Navy chaplain practices and policies.

case could have been brought, D.C. Cir. Docket No. 07-5271. The *Gibson* plaintiffs argue that no attorney would file their case in the District of Columbia because of the adverse case law in *CFGC* and *Adair*. Among other issues, they argue that all other Circuits and Districts would apply strict scrutiny to the 26-year denominational preference in accord with *Hernandez v. C.I.R.*, 490 U.S. 680 (1989), while the D.C. District Court has rejected strict scrutiny of the 26-year practice, *Adair v. England*, 417 F.Supp.2d 1, 6 (D.D.C. 2006). *Adair*'s 2006 holding rejected its 2002 holding that "if the plaintiffs can demonstrate after discovery that some or all of the Navy's policies and practices suggest a denominational preference, then the court will apply strict scrutiny to those policies and practices for which plaintiffs have met this initial burden." *Adair v. England*, 217 F.Supp.2d, 7, 14-15 (D.D.C. 2002) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989)).

Respondents' Citation to This Case as Authority

Taking issue with the *Gibson* Petitioners' argument that all other Districts and Circuits would apply strict scrutiny to the 26-year denominational preference *Gibson* challenges, Respondents cited this case:

> [W]e feel obliged to note the serious inaccuracies of the *Gibson* plaintiffs'

characterization of the relative reception their claims would receive in this and other circuits. The *Gibson* plaintiffs' claim that "[e]very *other* district would apply strict scrutiny" to evaluate their claims is factually incorrect, as the United States District Court for the Southern District of California held that strict scrutiny did not apply to the nearly identical claims brought by a non liturgical Protestant chaplain challenging his involuntary early retirement. A182–A184 (*Wilkins v. United States*, No. 99-CIV-1579-IEG (S.D. Cal. June 29, 2005)). The statement is also mystifying, since the *Gibson* plaintiffs' counsel represented the plaintiff in *Wilkins* and argued on appeal that "The District Court Failed Its Duty to Apply Strict Scrutiny." A200–A201 (*Wilkins v. United States*, No. 05-5363 (9th Cir.) (excerpts from Appellant's Br.)). (The Ninth Circuit rejected that argument in an unpublished disposition. *See Wilkins v. United States*, 232 Fed. Appx. 710 (9th Cir. 2007).)

In re David Gibson, D.C. Cir. No. 07-5271, Respondents' 11/8/07 Opposition at 23-24.

Respondents' citation to this case is a perfect illustration of the very reasons Wilkins cites for granting certiorari. Despite the Ninth Circuit's holding that its decision is not precedent, *see Wilkins*, 232 Fed. Appx. 710 n.2, this case remains authority for allowing the Navy's denominational preferences to go unaddressed. *See* Petition at 34, arguing that the District Court's reliance on another district court's faulty reasoning in violation of the Establishment Clause precedent "is a prime example of why this Court's supervisory oversight is not only appropriate but required."

Respectfully submitted,

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